LEXSEE

CHEMTROL ADHESIVES, INC. v. AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY ET AL.; LEXINGTON INSURANCE COMPANY, APPELLANT; MIDLAND-ROSS CORPORATION, ROSS AIR SYSTEMS DIVISION, APPELLEE

No. 87-1979

Supreme Court of Ohio

42 Ohio St. 3d 40; 537 N.E.2d 624; 1989 Ohio LEXIS 38; CCH Prod. Liab. Rep. P12,112; 9 U.C.C. Rep. Serv. 2d (Callaghan) 88

January 11, 1989, Submitted
April 19, 1989, Decided

PRIOR HISTORY: [***1]

APPEAL from the Court of Appeals for Portage County, No. 1737.

This appeal arises from the sale of an "arch dryer" system by appellee Midland-Ross Corporation ("Midland-Ross") to Chemtrol Adhesives, Inc. ("Chemtrol").

Chemtrol is engaged in the business of manufacturing and selling pressure-sensitive labeling stock. As part of the manufacturing process, the paper used to make the labels is coated with silicone. An arch dryer is used to evaporate excess moisture from the silicone/solvent mixture. At some point, an explosion occurred in Chemtrol's arch dryer system, and Chemtrol engaged Midland-Ross to design and build a new arch dryer. Following negotiations aimed at safety, efficiency, and cost reduction, the parties agreed to a system which included a "heat recovery system" designed to "transfer the waste heat from the exhaust system indirectly to the incoming make-up air" thereby decreasing fuel requirements. While this heat recovery system was originally to be a "Q" dot system, a Supertherm, hot-water based system, which involved water-filled heat exchanger coils, was substituted by agreement.

The Midland-Ross system was installed and placed into service in May 1980. [***2] In December of the year, the feeding device in the paper-coating machine malfunctioned causing the system, including the furnace heating the system, to automatically shut down. However, the system's air-intake fan was not designed to shut off automatically, and it continued to draw cold outside air across the hot-water coils. The fan's operation while the furnace was down eventually caused the water in the heat exchange coils to freeze, rupturing the coils. Chemtrol engaged Jacco Service, Inc. ("Jacco") to repair the coils. According to appellant, Midland-Ross was advised of the problem and sent representatives to investigate the system. Apparently, following a second freezing of the coils and further repairs by Jacco, the system was returned to operational status in June 1981, but not before Chemtrol had suffered substantial loss.

Chemtrol was insured by American Manufacturers Mutual Insurance Company ("American") and appellant Lexington Insurance Company ("Lexington"). In December 1981, Chemtrol brought the instant breach of contract action against American and Lexington, alleging wrongful refusal to provide insurance benefits for the losses incurred. Lexington filed third-party [***3] claims against Midland-Ross, Noe & Bryer (apparently the manufacturer of the attendant "solvent recovery system"), and Jacco. American filed a separate action for indemnification against Midland-Ross, and this action was subsequently consolidated with Lexington's third-party action against Midland-Ross.

The claims against Midland-Ross were based on theories of negligence, strict liability, breach of express and implied warranties, and breach of contract. Midland-Ross moved for summary judgment against Lexington and American, and the trial court sustained Midland-Ross' motion as to all theories. Both Lexington and American appealed. The court of appeals affirmed, and Lexington filed a timely appeal with this court.

The cause is now before this court upon the allowance of a motion to certify the record.

DISPOSITION: *Judgment affirmed in part, reversed in part, and cause remanded.*

42 Ohio St. 3d 40, *; 537 N.E.2d 624, **;
1989 Ohio LEXIS 38, ***; CCH Prod. Liab. Rep. P12,112

SYLLABUS

1. An insurer-subrogee cannot succeed to or acquire any right or remedy not possessed by its insured-subrogor.

[***4] 2. A commercial buyer seeking recovery from the seller for economic losses resulting from damage to the defective product itself may maintain a contract action for breach of warranty under the Uniform Commercial Code; however, in the absence of injury to persons or damage to other property, the commercial buyer may not recover for economic losses premised on tort theories of strict liability or negligence.

COUNSEL: *Arter & Hadden, Anthony J. Damelio, Jr.; Denenberg, Tuffley, Bocan, Jameson, Black, Hopkins & Ewald, P.C., William G. Jameson, George F. Curran III* and *Dana L. Ramsay,* for appellant.

Thompson, Hine & Flory, Daniel W. Hammer, Jeffrey R. Appelbaum and *Thomas L. McGinnis,* for appellee.

JUDGES: WRIGHT, J. MOYER, C.J., HOLMES, H. BROWN and RESNICK, JJ., concur. SWEENEY and DOUGLAS, JJ., concur in part and dissent in part.

OPINION BY: WRIGHT

OPINION

[*41] [**627] Several issues are presented herein for review. The first is whether the subrogee of a commercial consumer may maintain an action keyed to negligence and strict liability theories for solely economic damages. The second is whether the trial court was correct in entering summary judgment against Lexington in its breach of warranty action [***5] against Midland-Ross on the grounds that Midland-Ross did not receive timely and adequate notice of its alleged breach of the contract. Finally, we must determine whether to give effect to the limitation-of-damages provisions contained in the contract at issue. For the reasons set forth below, the judgment of the court of appeals is affirmed in part and reversed in part.

I

Few matters in the development of products liability law have generated more judicial inquiry and scholarly comment than the ever-uncertain boundary between tort and contract. On the one hand, our system is guided by the equitable policy of tort law that injured consumers should be entitled to recover from those who manufacture [**628] and distribute a defective product. [1] On the other hand, fundamental principles [*42] of contract law teach us that parties to a commercial transaction should remain free to govern their own affairs. [2] Here we are faced with a situation where both tort and contract principles are invoked.

1 "The doctrine of strict products liability in tort was created 'to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.'" *Purvis v. Consol. Energy Products Co.* (C.A.4, 1982), 674 F. 2d 217, 219 (quoting *Greenman v. Yuba Power Products, Inc.* [1963], 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P. 2d 897, 901).

[***6]

2 As provided in UCC Section 1-102(C), codified at R.C. 1301.02(C):

"The effect of provisions of * * * [Chapters 1301 to 1309, inclusive] of the Revised Code may be varied by agreement, except as otherwise provided in these chapters and except that the obligations of good faith, diligence, reasonableness, and care prescribed by these chapters may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

Appellant Lexington argues that in seeking indemnification from Midland-Ross it is not limited to an action on the Chemtrol/Midland-Ross contract. In its third-party complaint against Midland-Ross, Lexington asserted tort claims sounding in negligence, breach of express and implied warranties, and strict liability. The trial court held that these counts of the third-party complaint "must fail as the Ohio Uniform Commercial Code governs the rights and liabilities of the parties where the transaction involved was a commercial transaction and the parties [***7] where in privity of contract." The court of appeals agreed, concluding as to this issue: "Since the trial court found that the parties were large corporations in privity of contract who negotiated from equal bargaining positions, * * * [Lexington's] rights were limited to the contract provisions and the UCC."

Lexington sued Midland-Ross for "all damages recovered by * * * [Chemtrol] against Lexington * * *." As Chemtrol's insurer and subrogee, Lexington succeeds to all rights and the benefit of all remedies available to Chemtrol. *State v. Jones* (1980), 61 Ohio St. 2d 99, 100-101, 15 O.O.3d 132, 133, 399 N.E.2d 1215, 1216-1217. However, an insurer-subrogee cannot succeed to or acquire any right or remedy not possessed by its insured.

Aetna Cas. & Sur. Co. v.. *Hensgen* (1970), 22 Ohio St. 2d 83, 91, 51 O.O.2d 106, 111, 258 N.E.2d 237, 242-243. Accordingly, since Lexington's remedies are limited to those possessed by Chemtrol, our inquiry must focus on the damages claimed by Chemtrol and whether Chemtrol itself would be able to recover from Midland-Ross for same.

Chemtrol's complaint against Lexington and American alleged "damage to property insured by * * * [Lexington [***8] and American] with resultant expenses and business interruption losses continuing until June 30, 1981 * * *."

Chemtrol itemized its claim of $ 225,407.43 in damages as follows:

"1. $ 33,005.00 for additional energy costs.

"2. $ 18,119.97 for the extra expense incurred by Chemtrol for the purchase of outside silicone coated paper while the line was down and being repaired.

"3. $ 186,944.30 of solvent which had to be purchased during the time the heat exchangers were down.

"4. $ 1,710.00 -- The difference in valuation of 9500 gallons of solvent inventory.

"5. $ 15,628.16 -- Invoices for initial repair and final replacement for Jacco, Hudson, Ohio as well as some minor amounts for clean-up supplies, labor and items of that nature."

The Chemtrol/Midland-Ross contract contained a one-year limited warranty [*43] and a limitation of Midland-Ross' potential liability as follows:

"WARRANTY

"Except as hereinafter in this section set forth, all equipment sold by Seller is warranted for a period of one year from the date of shipment to the Purchaser to be free from latent defects in material and [**629] workmanship disclosed under normal use and service. If the Purchaser within this [***9] period notifies Seller in writing of any claimed defect in any equipment delivered by Seller and such equipment is found by Seller, after appropriate tests and inspection by Seller, not to be in conformity with this warranty, Seller will at its option and expense either repair the same or provide a replacement therefor, F.O.B. Seller's shipping point. THE WARRANTY STATED HEREIN IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY OR FITNESS FOR PARTICULAR USE.

"LIABILITY LIMITATION

"In the event of a breach or repudiation of this contract on any of the provisions by the Seller, Purchaser shall not be entitled to recover incidental or consequential damages including those arising upon breach of IMPLIED WARRANTY OF MERCHANTABILITY or any losses, costs, expenses, liabilities and damages (including, but without limitation to, loss of use or profits, damages to property, all liabilities of the Purchaser to its customers or third persons, and all other special or consequential damages) whether direct or indirect, and whether or not resulting from, or contributed to by the default or negligence of Seller, its agents, employees, or subcontractors, which might be claimed [***10] as the result of the use or failure of the equipment delivered. Nor shall the Purchaser be entitled to recover any costs for materials expended or used, initiated at the request of the Buyer or Purchaser. Seller's liability on its warranty shall in no event exceed its cost of correcting the defects in the equipment sold or replacing the same with non-defective equipment." (Capitalization *sic*.)

It is obvious that Chemtrol's right to recover the damages sustained would be significantly limited under the contract. (This issue is discussed in greater detail in Part III, *infra*.) As noted above, Lexington's right to recover from Midland-Ross rises no higher than that of Chemtrol. However, Lexington seeks to go outside the contract and assert claims against Midland-Ross based upon various tort theories.

Generally speaking, a defective product can cause three types of injury: personal injury, property damage, and economic loss. *Mead Corp.* v.. *Allendale Mut. Ins. Co.* (N.D. Ohio 1979), 465 F. Supp. 355, 363. "Personal injury" is, of course, self-explanatory. "Property damage" generally connotes either damage to the defective product itself or damage to other property. [***11] "Economic loss" is described as either direct or indirect. "Direct" economic loss includes the loss attributable to the decreased value of the product itself. Generally, this type of damages encompasses "the difference between the actual value of the defective product and the value it would have had had it not been defective." *Id.*; *Cincinnati Gas & Elec. Co.* v.. *General Elec. Co.* (S.D. Ohio 1986), 656 F. Supp. 49, 56. It may also be described as "the loss of the benefit of the bargain * * *." *Spring Motors Distributors, Inc.* v.. *Ford Motor Co.* (1985), 98 N.J. 555, 566, 489 A. 2d 660, 665; *Mid Continent Aircraft Corp.* v.. *Curry Cty. Spraying Service, Inc.* (Tex. 1978), 572 S.W. 2d 308, 312-313. [*44] "Indirect" economic loss includes the consequential losses sustained by the purchaser of the defective product, which may include the value of production time lost and the resulting lost profits. See, generally, Comment, The Vexing Problem of the Purely Economic

Loss in Products Liability: An Injury in Search of a Remedy (1972), 4 Seton Hall L. Rev. 145, 154-155; Note, Economic Loss in Products Liability Jurisprudence (1966), 66 Colum. L. Rev. 917, 918 (hereinafter [***12] "Note, Economic Loss").

In the instant case, no personal injuries are claimed to have been sustained as a result of the defect in the arch dryer system. Of the damages claimed, Items 1 through 4 above are additional production expenses incurred by Chemtrol, *i.e.,* consequential expenses generally regarded as economic loss. However, Item 5, costs of repair and replacement of the damaged components of the system, presents a more difficult classification problem. The definition of "economic loss" typically includes cost of repair or replacement of the defective product. See, *e.g., Salmon Rivers* [**630] *Sportsman Camps, Inc.* v.. *Cessna Aircraft Co.* (1975), 97 Idaho 348, 351, 544 P. 2d 306, 309; *Cincinnati Gas & Elec. Co., supra,* at 56. However, a product's self-inflicted damage is by definition "property damage." Courts have used both characterizations to describe damage to the product itself. See, *e.g., Iacono* v.. *Anderson Concrete Corp.* (1975), 42 Ohio St. 2d 88, 93, 71 O.O.2d 66, 69, 326 N.E.2d 267, 270 (property damage); *St. Paul Fire & Marine Ins. Co.* v.. *Steeple Jac, Inc.* (Minn. App. 1984), 352 N.W. 2d 107, syllabus (economic loss). However, as discussed [***13] in Note, Privity Revisited: Tort Recovery by a Commercial Buyer for a Defective Product's Self-Inflicted Damage (1985), 84 Mich. L. Rev. 517, 521-524, the better practice is to analyze such damage within the context of the transaction, considering the relationship between the parties, the nature of the product's defect, and the manner in which the damages were sustained. Accordingly, the determination of whether recovery in tort is available for damage to the defective product itself requires more than a simple labeling of that damage as "property" or "economic."

A

In Count I of its third-party complaint, Lexington alleges numerous instances of Midland-Ross' negligence in the design, manufacture, and installation of the arch dryer. For actions sounding in negligence, "[t]he well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Nebraska Innkeepers, Inc.* v.. *Pittsburgh-Des Moines Corp.* (Iowa 1984), 345 N.W. 2d 124, 126. Accord *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union, Local No. 226* v.. *Stern* (1982), 98 Nev. 409, [***14] 410-411, 651 P. 2d 637, 638. See, also, Note, Economic Loss, *supra,* at 929 (noting that "[n]egligence has proved to be among the least fruitful avenues for recovery of economic loss"). As summarized by Dean Prosser:

"There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes, as well as damage to any other property in the vicinity. But where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the [*45] value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule * * * that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery." (Footnotes omitted.) Prosser, Law of Torts (4 Ed. 1971) 665, Section 101.

Numerous jurisdictions have subsequently cited this passage in denying recovery in negligence for purely economic loss. See, *e.g., Affiliates for Evaluation & Therapy, Inc.* v.. *Viasyn Corp.* (Fla. App. 1987), 500 So. 2d 688, [***15] 691-692; *Long* v.. *Jim Letts Oldsmobile, Inc.* (1975), 135 Ga. App. 293, 295, 217 S.E. 2d 602, 604; *Clark* v.. *Internatl. Harvester Co.* (1978), 99 Idaho 326, 333, 581 P. 2d 784, 791.

The law of Ohio has been in accord with this majority view. In *Inglis* v.. *American Motors Corp.* (1965), 3 Ohio St. 2d 132, 32 O.O.2d 136, 209 N.E.2d 583, paragraph one of the syllabus, we held that "[i]n an action involving product liability based on negligence against the manufacturer of the product by a buyer of the product not in privity of contract with the manufacturer, there is no liability for pecuniary loss of bargain."

The reason for denying recovery in negligence for purely economic loss lies not in a failure to find "negligent" conduct by the manufacturer, nor in a lack of proximate relationship between that conduct and the consumer's injury. Rather, the key factor is the extent, and more important, the source, of the duty owed by the manufacturer to the consumer. In negligence, the law imposes upon the manufacturer of a product the duty of reasonable care. That duty protects the consumer from physical injury, whether to person or property. However, the law of negligence [***16] does [**631] not extend the manufacturer's duty so far as to protect the consumer's economic expectations, for such protection would arise not under the law but rather solely by agreement between the parties. "[W]hen the promisee's injury consists merely of the loss of his bargain, no tort claim arises because the duty of the promisor to fulfill the term of the bargain arises only from the contract." *Battista* v.. *Lebanon Trotting Assn.* (C.A. 6, 1976), 538 F. 2d 111, 117, quoted in *Cincinnati Gas & Elec. Co., supra,* at 61. See, also, *Clark, supra,* at 336, 581 P. 2d at 794 (concluding that "judicial expansion of negligence law to cover purely economic losses would only add

more confusion in an area already plagued with overlapping and conflicting theories of recovery").

In the instant case, Midland-Ross provided Chemtrol with an arch dryer pursuant to the contract between them. If the defect in the arch dryer had caused personal injury or damage to other property of Chemtrol, Midland-Ross might be found to have breached its duty of care imposed by law, and recovery in negligence would accordingly lie. However, Chemtrol's losses here were economic, *i.e.*, additional expenses [***17] incurred because the Midland-Ross arch dryer did not perform as expected. Midland-Ross' duty to provide a working arch dryer arose not under the law of negligence but rather under its contract with Chemtrol. Accordingly, it is the law of contracts, and not the law of negligence, to which Chemtrol must look for a remedy. *Cincinnati Gas & Elec. Co., supra,* at 60-61.

Here again, however, we see the problem with classifying a product's self-inflicted damage. As noted in Dean Prosser's passage above, "property damage to the defective chattel itself" may be recovered in negligence, while "the cost of repairing it" is not similarly protected. For an ordinary consumer, *i.e.*, one not in privity of [*46] contract with the seller or manufacturer against whom recovery is sought, an action in negligence may be an appropriate remedy to protect the consumer's property interests. However, where the buyer and seller are in privity of contract, and they have negotiated that contract from relatively equal bargaining positions, the parties are able to allocate the risk of all loss, including loss of the subject product itself, between themselves. Therefore, any protection against the [***18] product's self-inflicted damage in the latter context is better viewed as arising under the contract and not under the law of negligence.

B

Lexington's third-party complaint also alleges tort liability for breach of various express and implied warranties. In Ohio, there has been some confusion about the difference between tort actions sounding in breach of express or implied warranty and tort actions sounding in strict liability. Undoubtedly much of the confusion derives from the use of the word "warranty," which suggests contract and its attendant requirement of privity. Indeed, the implied warranty action has been described as a "hybrid" action, with its "commencement in contract and its termination in tort." *Santor* v. *A & M Karagheusian, Inc.* (1965), 44 N.J. 52, 64, 207 A. 2d 305, 311. However, as we stated in *Iacono* v. *Anderson Concrete Co., supra,* at 91, 71 O.O.2d at 68, 326 N.E.2d at 269, fn. 1, "[t]his court has recognized that, historically, an action grounded on breach of warranty sounded in tort rather than contract. It is a mistaken notion that use of the term 'warranty' always carried the implication of a contractual relationship. *Rogers* v. [***19] . *Toni Home Permanent Co.* (1958), 167 Ohio St. 244, 147 N.E.2d 612."

While *Iacono* did not discuss the doctrine of strict liability, an earlier decision of this court, *Lonzrick* v. *Republic Steel Corp.* (1966), 6 Ohio St. 2d 227, 35 O.O.2d 404, 218 N.E.2d 185, cited 2 Restatement of the Law 2d, Torts (1965) 347-348, Section 402A, and the landmark case of *Greenman* v. *Yuba Power, supra,* in recognizing a cause of action for breach of implied warranty in the absence of privity. *Id.* at 239, 35 O.O.2d at 411, 218 N.E.2d at 193-194. Section 402A was subsequently approved and adopted in *Temple* v. *Wean* [**632] *United, Inc.* (1977), 50 Ohio St. 2d 317, 322, 4 O.O.3d 466, 469, 364 N.E.2d 267, 271, in which we recognized that "there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort * * *." Accordingly, the two theories have been used interchangeably and analyzed together. See *Avenell* v. *Westinghouse Elec. Corp.* (1974), 41 Ohio App. 2d 150, 156, 70 O.O.2d 316, 320, 324 N.E.2d 583, 588, fn. 5 (citing Note, Product Liability: A Synopsis [1967], 30 Ohio St. L. J. 551).

Two [***20] cases are universally recognized as the seminal decisions on the question of whether economic loss is recoverable in a strict liability action: *Santor* v. *A & M Karagheusian, Inc., supra,* and *Seely* v. *White Motor Co.* (1965), 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P. 2d 145. In *Santor,* the New Jersey Supreme Court held that a plaintiff who had purchased carpeting from a third-party distributor could recover direct economic loss from the manufacturer under theories of implied warranty of merchantability and strict liability. As to the implied warranty theory, the court recognized that "[t]here is no doubt that the great mass of warranty cases imposing liability on the manufacturer regardless [*47] of lack of privity were concerned with personal injuries to the ultimate consumer." *Id.* at 59, 207 A. 2d at 308. However, the court refused to distinguish cases where the only damage is loss of value of the article sold, reasoning that "since 'the basis of liability turns not upon the character of the product [*i.e.,* whether, if defective, it is likely to cause personal injury] but upon the representation, there is no justification for a distinction on the basis [***21] of the type of injury suffered or the type of article or goods involved.'" *Id.* at 61, 207 A. 2d at 309 (quoting *Randy Knitwear, Inc.* v. *American Cyanamid Co.* [1962], 11 N.Y. 2d 5, 15, 226 N.Y. Supp. 2d 363, 370, 181 N.E.2d 399, 404). The court thereafter observed that "the manufacturer's liability may be cast in simpler form," *i.e.,* strict liability in tort. *Santor* at 63, 207 A. 2d at 311.

In *Seely,* the California Supreme Court allowed a truck purchaser to recover both direct and indirect economic loss (lost profits and loss of the purchase price) from the manufacturer pursuant to an express warranty in the purchase order, but also held that a strict liability theory could not be used to recover for purely economic loss. On the latter issue, the court stated that "[t]he history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries." *Id.* at 15, 45 Cal. Rptr. at 21, 403 P. 2d at 149. In the court's view, the rules of warranty are best suited to govern the issue of recovery [***22] for commercial losses. [3]

3 In the words of Chief Justice Traynor:

> "The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone. * * * The Restatement of Torts similarly limits strict liability to physical harm to person or property. * * *" (Citations omitted.) *Seely, supra,* at 18, 45 Cal. Rptr. at 23, 403 P. 2d at 151.

[***23] Shortly after *Seely* and *Santor* were decided, commentators extensively analyzed the policies and principles on which each was based. See, *e.g.,* Note, Economic Loss, *supra*; Note, Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages -- Tort or Contract? (1966), 114 U. Pa. L. Rev. 539; Note, Manufacturers' [**633] Strict Tort Liability to Consumers for Economic Loss (1967), 41 St. John's L. Rev. 401. Subsequently, the overwhelming majority of jurisdictions considering the questions raised therein have followed the *Seely* view, holding that economic losses generally are not recoverable in a tort action. See, *e.g., Moorman Mfg. Co.* v.. *Natl. Tank Co.* (1982), 91 Ill. 2d 69, 435 N.E.2d 443; *Superwood Corp.* v.. [*48] *Siempelkamp Corp.* (Minn. 1981), 311 N.W. 2d 159. [4] However, there has also been some support for the *Santor* view. See, *e.g., Mead Corp., supra* (economic loss recoverable on a theory of strict liability); *State, ex rel. Western Seed Production Corp.,* v.. *Campbell* (1968), 250 Ore. 262, 442 P. 2d 215 (negligence); *Berg* v.. *General Motors Corp.* (1976), 87 Wash. 2d 584, 555 P. 2d 818 (negligence); [***24] *La Crosse* v.. *Schubert, Schroeder & Assoc., Inc.* (1976), 72 Wis. 2d 38, 240 N.W. 2d 124 (strict liability).

4 In both *Moorman* and *Superwood* the courts rejected tort claims sounding in strict liability as well as in negligence. Some cases adopting the *Seely* view have broadly rejected "tort" actions or "products liability" actions, while others have more specifically discussed negligence and/or strict liability. See, *e.g., Morrow* v.. *New Moon Homes, Inc.* (Alaska 1976), 548 P. 2d 279, 285-286 (strict liability); *Salt River Project Agricultural Improvement & Power Dist.* v.. *Westinghouse Elec. Corp.* (1984), 143 Ariz. 368, 379-380, 694 P. 2d 198, 209-210 (strict liability); *Richard O'Brien Companies* v.. *Challenge-Cook Bros., Inc.* (D. Colo. 1987), 672 F. Supp. 466, 471-473 (applying Colorado law; strict liability and negligence); *Long Mfg., N.C., Inc.* v.. *Grady Tractor Co.* (1976), 140 Ga. App. 320, 323, 231 S.E. 2d 105, 108 (strict liability); *Adkison Corp.* v.. *American Bldg. Co.* (1984), 107 Idaho 406, 410-411, 690 P. 2d 341, 345-346 (implied warranty and negligence); *Prairie Production, Inc.* v.. *Agchem Division-Pennwalt Corp.* (Ind. App. 1987), 514 N.E.2d 1299, 1304-1306 (negligence); *Nelson* v.. *Todd's Ltd.* (Iowa 1988), 426 N.W. 2d 120, 123 (strict liability); *Frey Dairy* v.. *A.O. Smith Harvestore Products, Inc.* (E.D. Mich. 1988), 680 F. Supp. 253, 256 (applying Michigan law; all tort remedies); *Natl. Crane Corp.* v.. *Ohio Steel Tube Co.* (1983), 213 Neb. 782, 790, 332 N.W. 2d 39, 44 (strict liability and negligence); *Central Bit Supply, Inc.* v.. *Waldrop Drilling & Pump, Inc.* (1986), 102 Nev. 139, 140-141, 717 P. 2d 35, 36 (strict liability and negligence); *Pub. Service Co. of New Hampshire* v.. *Westinghouse Elec. Corp.* (D.N.H. 1988), 685 F. Supp. 1281, 1284-1287 (applying New Hampshire law; strict liability and negligence);

Colonial Park Country Club v.. *Joan of Arc* (C.A.10, 1984), 746 F. 2d 1425, 1428 (applying New Mexico law; products liability); *Hagert* v.. *Hatton Commodities, Inc.* (N.D. 1984), 350 N.W. 2d 591, 595 (strict liability); *Aloe Coal Co.* v.. *Clark Equip. Co.* (C.A.3, 1987), 816 F. 2d 110, 117, certiorari denied (1987), 484 U.S. , 98 L. Ed. 2d 111, 108 S. Ct. 156 (applying Pennsylvania law; negligence); *Purvis* v.. *Consol. Energy Products Co.* (C.A.4, 1982), 674 F. 2d 217, 222 (applying South Carolina law; strict liability); *Corporate Air Fleet of Tennessee, Inc.* v.. *Gates Learjet, Inc.* (M.D. Tenn. 1984), 589 F. Supp. 1076, 1080 (applying Tennessee law; strict liability); *Star Furniture Co.* v.. *Pulaski Furniture Co.* (W. Va. 1982), 297 S.W. 2d 854, 859 (strict liability.

[***25] Prior decisions of this court appear to favor the *Santor* approach. In *Inglis* v.. *American Motors Corp., supra,* a purchaser of an automobile sued to recover the difference between the amount he had paid for the automobile and the automobile's actual value in light of its substantially defective condition. While rejecting plaintiff's negligence theory, we nevertheless held that plaintiff could recover the direct economic loss sustained despite his lack of privity on a theory of "express warranty." [5]

5 Early in the evolution of products liability jurisprudence, this court recognized a cause of action for breach of express warranty to recover for personal injury, despite the lack of privity between the plaintiff, an "ultimate purchaser," and the defendant manufacturer. *Rogers* v.. *Toni Home Permanent Co.* (1958), 167 Ohio St. 244, 4 O.O.2d 291, 147 N.E.2d 612, paragraph three of the syllabus.

Later, in *Iacono* v.. *Anderson Concrete Corp., supra,* this court held that [*49] an action in [***26] tort on a theory of breach of implied warranty may be maintained to recover for damage to property. *Id.* at syllabus. We saw no reason to distinguish between property damage and personal injury, for which a cause of action for breach of implied warranty had previously been recognized in *Lonzrick* v.. *Republic* [**634] *Steel Corp., supra.* [6] *Iacono, supra,* at 93, 71 O.O.2d at 69, 326 N.E.2d at 270. However, while the damages sustained in *Iacono* were described as "property" damage, they were in fact merely defects in the product itself which reduced the product's value, *i.e.,* economic damages. *Mead Corp., supra,* at 366; Note, Recovery of Direct Economic Loss: The Unanswered Questions of Ohio Products Liability Law (1977), 27 Case W. Res. L. Rev. 683, 685-690. Thus, taken together, *Inglis* and *Iacono* stand for the proposition that in Ohio an action in tort for breach of express or implied warranty, or an action in strict liability, may be maintained for purely economic loss. However, notably absent from these cases is the element of privity of contract between the injured plaintiff and the manufacturer-defendant. Accordingly, they do not answer the precise [***27] question raised today, *i.e.,* whether economic loss may be recovered in strict liability where the parties *are* in privity of contract. See *Cincinnati Gas & Elec. Co., supra,* at 58.

6 In *Lonzrick,* this court held that in a products liability case, "there are three possible causes of action which the plaintiff may pursue:

"(1) An action in tort which is grounded upon negligence. * * *

"(2) A cause of action which is based upon contract. * * * [and]

"(3) An action in tort which is based upon the breach of a duty assumed by the manufacturer-seller of a product [implied warranty in tort] * * *." *Id.* at 229-230, 35 O.O.2d at 405-406, 218 N.E.2d at 188. However, we note that, contrary to Lexington's suggestion, *Lonzrick* certainly does not stand for the proposition that all three *possible* causes of action are available in every case. As an obvious example, an action based upon contract is only available where a contractual relationship exists between the plaintiff and the defendant. *Id.* at 229, 35 O.O.2d at 405, 218 N.E.2d at 188.

[***28] On this question we find the opinion of the Court of Appeals for Cuyahoga County in *Avenell* v.. *Westinghouse Elec. Corp., supra,* persuasive. In *Avenell,* the Toledo Edison Company purchased from Westinghouse a turbine generator which subsequently broke down, resulting in loss of profits and other consequential damages. Avenell, as assignee and subrogee of Toledo Edison, sued Westinghouse on various tort theories. The court first noted that a "plaintiff in a product liability case may bring an action in tort based upon the theory of implied warranty." *Avenell, supra,* at 156, 70 O.O.2d at 320, 324 N.E.2d at 587. However, the court stressed that the doctrine of implied warranty was designed to protect consumers not covered by contractual sales warranties because of the lack of privity. *Id.* at 157, 70 O.O.2d at 320, 324 N.E.2d at 588. Accordingly, where privity of contract existed the theory of implied warranty was unnecessary, and its application would in fact have the adverse consequence of negating contractual provisions for which the parties had clearly bargained:

"Application of the doctrine of implied warranty in tort to all products liability cases would [***29] render useless many, if not all, of the Uniform Commercial Code provisions involving products liability. For example, * * * whenever the doctrine of implied warranty in tort is applicable, the provisions of the Uniform Commercial Code [*50] permitting the parties to contractually modify or exclude warranties, and to modify or limit remedies are of no avail. Stated another way, where implied warranty in tort applies, the parties are not free to determine by contract the quality of goods which the seller is bound to deliver or the remedies available to the buyer in the event that the goods do not measure up to the agreed quality. It is clear, then, that the doctrine of implied warranty in tort must be limited in its applicability. Otherwise, unlimited application of the doctrine would emasculate the Uniform Commercial Code provisions dealing with products liability." *Id.* at 157-158, 70 O.O.2d at 321, 324 N.E.2d at 588. Accord *Superwood Corp.* v.. *Siempelkamp Corp., supra,* at 162.

Our belief that *Avenell* represents the overwhelming majority view is strongly supported by the United States Supreme Court's recent decision in *East River Steamship Corp.* v.. *Transamerica* [***30] *Delaval, Inc.* (1986), 476 U.S. 858, which rejected negligence and strict liability claims in admiralty where the parties are commercial entities in privity of contract and the only injury claimed is economic loss. We also find persuasive the New Jersey Supreme Court's decision in *Spring Motors Distributors, supra,* in which the court held that "a commercial buyer seeking damages for economic loss resulting from the purchase of defective goods may recover from an [**635] immediate seller and a remote supplier in a distributive chain for breach of warranty under the U.C.C., *but not in strict liability or negligence*. * * *" (Emphasis added.) *Id.* at 561, 489 A. 2d at 663. In finding that its earlier decision in *Santor* was not controlling, the court stressed that *Santor* determined the rights of an ultimate consumer not in privity of contract with the manufacturer, and did not involve an action between commercial parties. *Spring Motors* at 575, 489 A. 2d at 670. See, also, *Cincinnati Gas & Elec. Co., supra,* at 58 (distinguishing *Mead Corp., supra*); *Richard O'Brien Companies* v.. *Challenge-Cook Bros., Inc.* (D. Colo. 1987), 672 F. Supp. 466, 472 (distinguishing [***31] *Hiigel* v.. *General Motors Corp.* [1975], 190 Colo. 57, 544 P. 2d 983). While the court in *Spring Motors* noted the substantial criticism of *Santor,* it declined to reconsider that decision. *Spring Motors* at 574-575, 489 A. 2d at 670. [7]

7 Accordingly, we also need not reconsider the question whether, absent privity of contract, a plaintiff can recover purely economic losses under tort theories. While *Inglis* and *Iacono* held that such a plaintiff could recover, those decisions relied upon *Santor,* which has subsequently come to represent the minority view and has been the subject of substantial criticism.

We find the above analysis of economic losses applies equally to Chemtrol's consequential business expenses and to the damage sustained by the arch dryer itself. As to the latter, some courts have held that where the defect poses an unreasonable danger to persons or to other property of the buyer, recovery in strict liability is available despite the "fortuity" that only the defective [***32] product was damaged. See, *e.g., Cloud* v.. *Kit Mfg. Co.* (Alaska 1977), 563 P. 2d 248; *Star Furniture Co.* v.. *Pulaski Furniture Co.* (W. Va. 1982), 297 S.E. 2d 854. However, we agree that "where the loss to a defective product alone occurs in such a way as to pose no unreasonable danger of harm to person or other property, then UCC remedies will generally be appropriate and exclusive for recovery of the damage to the defective product [*51] itself. * * *" *Salt River Project Agricultural Improvement & Power Dist.* v.. *Westinghouse Elec. Corp.* (1984), 143 Ariz. 368, 379, 694 P. 2d 198, 209 (citing *Posttape Assoc.* v.. *Eastman Kodak Co.* [C.A.3, 1976], 537 F.2d 751). In this case we find that the air-intake fan's lack of an automatic shut-off mechanism, the primary defect alleged in this case, was not a defect that posed an unreasonable risk of harm to persons or to other property of Chemtrol. Thus, strict liability will not lie to recover for the arch dryer's self-inflicted damage.

C

In summary, we hold that a commercial buyer seeking recovery from the seller for economic losses resulting from damage to the defective product itself may maintain a [***33] contract action for breach of warranty under the Uniform Commercial Code; however, in the absence of injury to persons or damage to other property the commercial buyer may not recover for economic losses premised on tort theories of strict liability or negligence. In this case, then, Chemtrol's remedies against Midland-Ross would be limited to those available under the contract between them. Accordingly, Lexington's remedies are similarly limited, and thus we affirm the court of appeals' judgment upholding the trial court's dismissal of claims sounding in tort. [8]

8 Since both the trial court and the court of appeals found no UCC remedy available because of the inadequacy of notice to Midland-Ross, Lexington was left with no remedy at all. Other courts have held that the "existence of a contract remedy is irrelevant to the determination of whether contract or tort law provides the appropriate set of rules for recovery of damages.

* * *" *Oakbrook Terrace* v.. *Hinsdale Sanit. Dist.* (1988), 172 Ill. App. 3d 653, , 527 N.E.2d 70, 74 (citing *Anderson Elec., Inc.* v.. *Ledbetter Erection Corp.* [1986], 115 Ill. 2d 146, 153, 503 N.E.2d 246, 249). Accordingly, whether Lexington is barred from bringing its contract action under the UCC has no bearing on our holding that tort theories are unavailable.

[***34] II

Having found that contractual remedies alone are available to Lexington, we must now decide whether those remedies [**636] have been lost. Midland-Ross moved for summary judgment on the contract claims on grounds of Chemtrol's "failure, *as a matter of law,* to provide Midland-Ross with adequate and timely notice of any alleged breach by Midland-Ross." (Emphasis *sic.*) According to Midland-Ross, it received "no notice of the alleged breaches until December, 1982 when American and Lexington brought actions against it." Both the trial court and the court of appeals agreed. However, Lexington argues that Midland-Ross knew of the damage and in fact inspected Chemtrol's facility shortly after the damage occurred.

R.C. 1302.65(C) provides:

"Where a tender has been accepted:

"(1) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy * * *."

We must determine what constitutes notice of breach and whether such notice was given within a reasonable time in this case.

At the outset, we stress the well-established rule that the "determination of a reasonable time and the adequacy of notice [***35] to the seller are ordinarily questions of fact." *Kabco Equip. Specialists* v.. *Budgetel, Inc.* (1981), 2 Ohio App. 3d 58, 61, 2 OBR 65, 68, 440 N.E.2d 611, 614; *Allen Food Products, Inc.* v.. *Block Bros., Inc.* [*52] (S.D. Ohio 1980), 507 F. Supp. 392, 394; *Agway, Inc.* v.. *Teitscheid* (1984), 144 Vt. 76, 80, 472 A. 2d 1250, 1253. A trial court should be reluctant to grant summary judgment on the grounds that notice of breach was untimely as a matter of law.

The Official Comment following R.C. 1302.65 provides somewhat contradictory guidance as to how the notice requirement is to be construed:

"* * * The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (RC § 1302.63 [UCC 2-605]). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. [***36] The notification which saves the buyer's rights under this Chapter need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."

Some cases have focused on the more lenient clauses in the comment, stressing that the notice need not be a claim for damages or threaten litigation, see, *e.g.*, *Computer Strategies, Inc.* v.. *Commodore Business Machines, Inc.* (1984), 105 App. Div. 2d 167, 483 N.Y. Supp. 2d 716; *Paulson* v.. *Olson Implement Co.* (1982), 107 Wis. 2d 510, 319 N.W. 2d 855, or that notice is sufficient if it says the transaction is still "troublesome" and must be watched, see, *e.g.*, *Prutch* v.. *Ford Motor Co.* (Colo. 1980), 618 P. 2d 657. Other courts have adopted a strict standard, stressing that the notice must indicate that the transaction is "'claimed to involve a breach.'" *Eastern Air Lines, Inc.* v.. *McDonnell Douglas Corp.* (C.A.5, 1976), 532 F. 2d 957, 976. See, generally, Hammond, Notification of Breach Under Uniform Commercial Code Section 2-607(3)(a): A Conflict, A Resolution (1985), 70 Cornell L. Rev. 525.

Prior cases interpreting Ohio law [***37] appear to have endorsed the strict standard. For example, in *Standard Alliance Industries, Inc.* v.. *Black Clawson Co.* (C.A.6, 1978), 587 F. 2d 813, certiorari denied (1979), 441 U.S. 923, the court held that notice of breach was not timely despite evidence that the seller knew its machine was defective, knew that its repair attempts were inadequate, and knew that "it was in breach of the repair or replacement warranty." *Id.* at 824. On the specific question presented, "whether it was necessary to give additional notice of the failure of repair efforts," the court stated: "The express language of the statute [UCC Section 2-607(3)(a), codified in Ohio in R.C. 1302.65(C)(1)] and the official comment mandate notice regardless [of] [**637] whether either or both parties had actual knowledge of breach." *Id.* at 825. Subsequent cases from the Court of Appeals for the Sixth Circuit reiterate the strict view. See *Roth Steel Products* v.. *Sharon Steel Corp.* (C.A.6, 1983), 705 F. 2d 134; *K & M Joint Venture* v.. *Smith Internatl., Inc.* (C.A.6, 1982), 669 F. 2d 1106.

A situation similar to that in *Standard Alliance* is presented in the instant case. Lexington relies [***38] on two affidavits to support its argument that Midland-Ross had knowledge of the breakdown soon after its occurrence, and thus did receive timely notice of its breach. Jerome H. Wise, a former employee of Chemtrol, testified in pertinent part:

[*53] "* * * I was employed by Chemtrol when certain heat exchanger coils, supplied by Midland Ross in connection with the sale to Chemtrol of an arch dryer oven system, suffered freeze damage in December 1980.

"* * * I was involved in Chemtrol's efforts to resume operations following such damage, and recall contacting Mr. Ed Burke of Midland Ross concerning this loss and damage prior to my leaving Chemtrol in January 1981."

The other affidavit is that of Thomas E. Crowley, Jr., an insurance adjustor. Crowley testified that he was asked to investigate the loss at the Chemtrol plant on Lexington's behalf. As to what transpired during his investigation, Crowley testified:

"* * * During this meeting [with Chemtrol representatives] and subsequent meetings held at Chemtrol's plant, I was told by Chemtrol personnel that as a result of the freezing episodes of December 1980, Midland Ross recommended replacement of the water heat exchange [***39] medium with an anti-freeze liquid in the heat exchanger coils, which were damaged in December 1980, and that this recommendation was implemented prior to August 5, 1981.

"* * * During the course of my investigation and prior to Lexington's filing of suit against Midland Ross, I had at least one discussion with Mr. Eugene Bulgrin of Midland Ross' corporate insurance department, in which I informed him that I was investigating the December 1980 loss and damage and the failure of Midland Ross' heat recovery system on Lexington's behalf.

"* * * Based upon my personal observations and discussions with Chemtrol personnel between August 5, 1981 and the date suit was filed against Midland Ross by Lexington, I know Midland Ross personnel were present at Chemtrol's plant on a number of occasions between December 1980 and the date suit was filed. I believe the dates, times and purposes for such visits would be embodied in documents and reports maintained by Midland Ross, which I have never had the opportunity to review."

With its motion for summary judgment, Midland-Ross presented the affidavit of Eugene J. Kurie, a division manager for Midland-Ross, who testified: "Prior to December, 1982 [***40] Midland Ross Corporation received no notice of any claimed breach with respect to the sale of the heat recovery system to Chemtrol Adhesives, Inc." Midland-Ross also relies on Chemtrol's response to an interrogatory which indicates that no notice was provided to Midland-Ross. [9]

> 9 "INTERROGATORY NO. 1: Please state the date of the first notice, if any, and each subsequent notice, that you provided Midland Ross Corporation of the alleged failure, malfunction, breach or defect that forms the basis of this action.
>
> "ANSWER:
>
> "Chemtrol has no present knowledge that any such notice was provided."

Based upon our review of the record we find that the trial court was in error in concluding as a matter of law that the notice to Midland-Ross was inadequate. We stress that before summary judgment is granted a trial court must find that "'* * * (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable [***41] minds can come to but one conclusion and viewing [*54] such evidence most strongly in favor of the party against [**638] whom the motion for summary judgment is made, that conclusion is adverse to that party.'" *Van Fossen* v.. *Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 117, 522 N.E.2d 489, 505 (quoting *Temple* v.. *Wean United, Inc., supra,* at 327, 4 O.O.3d at 472, 364 N.E.2d at 274).

In the instant case, construing the evidence above in the light most favorable to Lexington, we cannot say as a matter of law that reasonable minds can come to but one conclusion. We recognize that written notice is not required under R.C. 1302.65(C)(1), and in many circumstances oral notice of breach has been found sufficient. See, *e.g.,* *Shooshanian* v.. *Wagner* (Alaska 1983), 672 P. 2d 455; *Delano Growers' Coop. Winery* v.. *Supreme Wine Co.* (1985), 393 Mass. 666, 473 N.E.2d 1066. While Chemtrol admits in effect that no formal notice was given, reviewing the Wise and Crowley affidavits a reasonable person could conclude that Midland-Ross had knowledge of the damage sustained by Chemtrol shortly after the damage occurred. A reasonable person could infer that this knowledge [***42] was provided by Chemtrol notwithstanding the lack of direct evidence that notice of the damages was so provided. We reject the strict reading of R.C. 1302.65(C)(1) in *Standard Alliance* and the cases succeeding it, as we believe that notice may be sufficient under the statute despite the fact that the notice does not specifically allege a breach of the contract. Moreover, in our view, the statute was not meant to exclude the possibility that notice may be inferred. See, *e.g.,* *Crest Container Corp.* v.. *R.H. Bishop Co.* (1982), 111 Ill. App. 3d 1068, 1077, 445 N.E.2d 19, 26 (visits by employee of defendant manufacturer during which he observed product's failure to operate, combined with prior requests for service by the buyer, constituted notice to manufacturer). Accordingly, the trial court erred in

granting summary judgment to Midland-Ross on Lexington's breach of contract claim.

If the fact-finder on remand determines that notice was not given shortly after the damages occurred, the question then becomes whether Lexington's filing of its third-party complaint constituted sufficient notice. Since notice of breach is a condition precedent to bringing an action for recovery, [***43] many courts have held that the filing of the complaint cannot constitute adequate notice. See, *e.g.,* *Armco Steel Corp. v.. Isaacson Structural Steel Co.* (Alaska 1980), 611 P.2d 507; *Lynx, Inc. v.. Ordnance Products, Inc.* (1974), 273 Md. 1, 327 A. 2d 502. We decline to adopt such an absolute rule, as we believe in a proper case the filing of a civil complaint could serve as notice of breach. However, this is not such a case, as Lexington's suit was filed a full two years after the damages were sustained. We agree with the courts below that Lexington's third-party complaint would be inadequate notice as a matter of law.

III

The final issue presented for our review is the validity of the "Warranty" and "Liability Limitation" provisions of the Chemtrol/Midland-Ross contract. Lexington challenges these provisions essentially on two grounds: first, that they are unconscionable; and second, that they cause the limited remedy of repair and/or replacement "to fail of its essential purpose." [10] Accordingly, Lexington claims entitlement [*55] to the full range of remedies available under R.C. Chapters 1303 through 1309 which range includes, *inter alia,* recovery [***44] for incidental and consequential damages pursuant to R.C. 1302.88(C) and 1302.89.

10 R.C. 1302.93(B) provides in part: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in Chapters * * * [1301 through 1309, inclusive] of the Revised Code."

Contracting parties are free to determine which warranties shall accompany their transaction. Accordingly, both the implied warranties of merchantability and of fitness may be excluded or modified, if the exclusion or modification meets the criteria set forth in R.C. 1302.29(B). The written Chemtrol/Midland-Ross contract [**639] provided such an exclusion: "* * * THE WARRANTY STATED HEREIN IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY OR FITNESS FOR PARTICULAR USE." The warranty of merchantability was specifically mentioned, as required by R.C. 1302.29(B), and the fact that the exclusion is in capital letters under the heading "WARRANTY," while the bulk of the contract is in regular type, [***45] compels our conclusion that the exclusion is conspicuous.

Pursuant to R.C. 1302.29(D) and 1302.93(A)(1), the seller may also limit the buyer's remedies for breach of warranty to the repair or replacement of the defective product. In addition, liability for consequential damages may be limited or excluded "unless the limitation or exclusion is unconscionable." R.C. 1302.93(C). As the Editor's Analysis following R.C. 1302.93 in Page's Revised Code notes, there is no requirement that an exclusion of consequential damages be "conspicuous." However, in *Avenell, supra,* the court, quoting Nordstrom, Law of Sales (1970) 376, held that a clause limiting remedies "'must be by a writing and conspicuous.'" *Id.* at 156, 70 O.O.2d at 320, 324 N.E.2d at 587. Here, the limitation of remedy for breach of warranty was set forth in a separate provision under a bold-faced heading titled "Liability Limitation," and was not in small print or otherwise obscured in any way. Therefore, since the limitation of liability in this case was clear and conspicuous, we need not address the question of whether an inconspicuous limitation would be enforceable.

As to appellant's first challenge, we agree [***46] with the Arizona Supreme Court that "[a]lthough a commercial purchaser is not doomed to failure in pressing an unconscionability claim, * * * findings of unconscionability in a commercial setting are rare." *Salt River Project, supra,* at 374, 694 P. 2d at 204 (citing White & Summers, Uniform Commercial Code [1972] 385-386). R.C. 1302.93(C) provides in part: "* * * Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable *but limitation of damages where the loss is commercial is not*." (Emphasis added.) Numerous cases have held that in a situation such as the instant case, where there is no great disparity of bargaining power between the parties, a contractual provision which excludes liability for consequential damages and limits the buyer's remedy to repair or replacement of the defective product is not unconscionable. See, *e.g.,* *Salt River Project, supra; Consol. Data Terminals v.. Applied Digital Data Systems, Inc.* (C.A.9, 1983), 708 F. 2d 385, 392, fn. 6; *Byrd Motor Lines, Inc. v.. Dunlop Tire & Rubber Corp.* (1983), 63 N.C. App. 292, 304 S.E. 2d 773.

As to its second challenge, Lexington cites [***47] two decisions to support its argument that the limitation-of-liability provision causes the remedy to fail of its essential purpose: *McCullough v.. Bill Swad Chrysler-Plymouth, [*56] Inc.* (1983), 5 Ohio St. 3d 181, 5 OBR 398, 449 N.E.2d 1289, and *Goddard v.. General Motors Corp.* (1979), 60 Ohio St. 2d 41, 14 O.O.3d 203, 396 N.E.2d 761. However, as Midland-Ross correctly notes,

the plaintiffs therein attempted to avail themselves of the repair and/or replacement remedy and were completely frustrated. See *McCullough, supra,* at 181-182, 5 OBR at 399-400, 449 N.E.2d at 1291; *Goddard, supra,* at 42-43, 14 O.O.3d at 203-204, 396 N.E.2d at 762-763. "Repair or replacement" remedies are designed "to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise." *Beal* v.. *General Motors Corp.* (D. Del. 1973), 354 F. Supp. 423, 426. Such limited remedies generally fail only where the seller is unable or unwilling to make repairs within a reasonable time. See, *e.g., Clark* v.. *Internatl. Harvester Co., supra,* at 340, 581 P. 2d [***48] at 798-799. See, generally, Eddy, On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2) (1977), 65 Calif. L. Rev. 28, 58-84. We note that the determination of whether a warranty [**640] has failed to fulfill its essential purpose is ordinarily a question of fact for the jury. *Cayuga Harvester, Inc.* v.. *Allis-Chalmers Corp.* (1983), 95 App. Div. 2d 5, 465 N.Y. Supp. 2d 606; *Johnson* v.. *John Deere Co.* (S.D. 1981), 306 N.W. 2d 231. However, in this case there is no evidence on which to base a finding that Midland-Ross was unable or unwilling to repair and/or replace the defective system within a reasonable time. Thus, it would be unreasonable as a matter of law to conclude that the remedy failed of its essential purpose. See *Tokio Marine & Fire Ins. Co., Ltd.* v.. *McDonnell Douglas Corp.* (C.A.2, 1980), 617 F. 2d 936, 940-941.

Accordingly, we hold that both the "Warranty" and the "Liability Limitation" provisions of the Chemtrol/Midland-Ross contract are valid and enforceable. Thus, we need not decide whether the exclusion of consequential damages would remain enforceable if the repair-or-replacement remedy had failed of its essential [***49] purpose. See, *e.g., Johnson* v.. *John Deere Co., supra,* at 238; cf. *Goddard, supra,* at 47, 14 O.O.3d at 206, 396 N.E.2d at 765; see, generally, Eddy, *supra,* at 84-92. From the itemized list set forth above of damages sustained by Chemtrol, it appears that most of the damages are expressly excluded under the contract. However, we remand this issue to the trial court for a determination of exactly which damages are excluded and for further proceedings in accordance with this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

CONCUR BY: DOUGLAS (In Part)

DISSENT BY: DOUGLAS (In Part)

DISSENT

DOUGLAS, J., concurring in part and dissenting in part.

I concur in paragraph one of the syllabus and the judgment of the majority. I respectfully dissent from paragraph two of the syllabus and the majority's discussion concerning recovery for economic losses premised on a tort theory of negligence.

While the majority opinion cites *Lonzrick* v.. *Republic Steel Corp.* (1966), 6 Ohio St. 2d 227, 35 O.O.2d 404, 218 N.E.2d 185, it does so only in a passing fashion and fails to note that in *Lonzrick* the court said:

"This is a products liability case. In such a case, there [***50] are three possible [*57] causes of action which the plaintiff may pursue:

"(1) An action in tort which is grounded upon negligence. Such cause of action does not require the allegation of a contractual relationship between the plaintiff and the defendant. * * *" *Id.* at 229, 35 O.O.2d at 405, 218 N.E.2d at 188.

Further, in *Iacono* v.. *Anderson Concrete Corp.* (1975), 42 Ohio St. 2d 88, 71 O.O.2d 66, 326 N.E.2d 267, and *Inglis* v.. *American Motors Corp.* (1965), 3 Ohio St. 2d 132, 32 O.O.2d 136, 209 N.E.2d 583, this court held that a plaintiff could maintain a tort action for damages that were solely economic. *Iacono* set forth the principle that Ohio courts will hold manufacturers liable on a tort theory for defectively made products even where no personal injuries are sustained. I would follow the dictates of these previous cases and, in addition to permitting a cause of action under the Uniform Commercial Code, I would permit appellant to proceed on its tort theory of negligence.

SWEENEY, [***51] J., concurs in the foregoing opinion.

LEXSEE

[*1] **Christopher Cirri et al., Plaintiffs, v. Daily News, L.P., Individually and as successor in interest to New York News Inc., Defendant.**

26512/03

SUPREME COURT OF NEW YORK, KINGS COUNTY

2005 NY Slip Op 51855U; 9 Misc. 3d 1130A; 862 N.Y.S.2d 807; 2005 N.Y. Misc. LEXIS 2544

February 7, 2005, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRIOR HISTORY: Mathias v. Daily News, L.P., 301 A.D.2d 503, 752 N.Y.S.2d 896, 2003 N.Y. App. Div. LEXIS 215 (N.Y. App. Div. 2d Dep't, 2003)

HEADNOTES

[**1130A] [***807] Contracts--Breach or Performance of Contract.

JUDGES: Carolyn E. Demarest, J.

OPINION BY: Carolyn E. Demarest

OPINION

Carolyn E. Demarest, J.

Upon the foregoing papers in this action for breach of contract, conversion, and unjust enrichment, defendant Daily News, L.P., individually and as successor in interest to New York News Inc., (defendant) moves for an order dismissing plaintiffs' complaint as against it, pursuant to CPLR 3211 (a) (5), as barred by the doctrines of res judicata and collateral estoppel; pursuant to CPLR 3013 for failure to plead adequately; and, pursuant to CPLR 3211 (a) (7) , for failure to state a cause of action.

Beginning in the early 1960's, defendant adopted a system of home delivery of the Daily News newspaper under which it designated individual carriers to have prime responsibility for delivery of the Daily News in specifically defined territories. Plaintiffs, who were carriers that participated in this program, executed carrier agreements with defendant. Plaintiffs allege that [*2] starting prior to 1995 and continuing to date, defendant has changed their work rules in breach of these carrier agreements with respect to delivery schedules, methods of collection, complaint resolution procedures, contract requirements, pricing, and customer lists, causing them to sustain damages and loss of business. Consequently, on July 15, 2003, plaintiffs commenced this action as against defendant, alleging causes of action for breach of contract, conversion, and unjust enrichment.

Two prior actions based upon the same claims asserted herein had been previously commenced by plaintiffs against defendant. One of these actions was brought in the Supreme Court, Richmond County (the State court action), and the other action was brought in the District Court for the Southern District of New York (the Federal court action).

In the State court action, plaintiffs had asserted a similar breach of contract claim to the one which they now assert in this action, and, in addition, had sought injunctive relief. Following a July 26, 1999 decision and order in the State court action which denied a preliminary injunction to plaintiffs, plaintiffs commenced the Federal court action, wherein they asserted five federal antitrust claims plus the same State law breach of contract claim asserted by them in the State court action. Plaintiffs, therefore, sought leave to discontinue the State court action, but due to a pending motion to dismiss by defendant in the Federal court action, that motion was denied on September 25, 2000, with leave to renew following a decision on that motion to dismiss in the Federal court action.

By decision and order dated July 23, 2001 (*Mathias v Daily News, L.P.*, 152 F. Supp. 2d 465, 487 [SD NY 2001]), the District Court dismissed four of the five Federal antitrust claims, but sustained one of these federal antitrust claims, which had alleged a claim for secondary-line price discrimination under the Robinson-Patman Act (plaintiffs' second cause of action in the Federal complaint). The Federal court, in its July 23,

2001 decision and order, noted that in order to establish a claim of secondary-line price discrimination under the Robinson-Patman Act, plaintiffs would be required to prove that the sales at issue were made in interstate commerce; that defendant had discriminated in price as between purchasers; that the product supplied by defendant was of comparable grade or quality as to competing purchasers; and that the price discrimination had a prohibited effect on competition. The Federal court found that while plaintiffs had pleaded sufficient allegations to survive defendant's motion to dismiss this claim, further discovery would determine if this claim could ultimately be substantiated (*id.* at 475).

Following this July 23, 2001 decision and order in the Federal action, plaintiffs again moved for leave to voluntarily discontinue the State action without prejudice. The Supreme Court, Richmond County, by decision and order dated October 16, 2001, granted such discontinuance with prejudice, and such order was, subsequently, reversed by the Appellate Division, Second Department, which, by decision and order dated December 3, 2002, granted the discontinuance of the State court action without prejudice (*Mathias v Daily News, L.P.*, 301 A.D.2d 503, 503-504, 752 N.Y.S.2d 896 [2002]).

After conducting discovery in the Federal action, plaintiffs concluded that they could not produce sufficient factual evidence to meet the foregoing requirements in order to sustain their claim under the Robinson-Patman Act and executed a Notice of Voluntary Dismissal dated January 6, 2003, wherein plaintiffs, "without prejudice to their rights . . . moved for voluntary dismissal with prejudice, of their claims for secondary-line price discrimination, as set forth within the "second cause of action" within the complaint." The Notice of Voluntary Dismissal expressly provided that [*3] plaintiffs "did not seek dismissal or withdrawal of the remaining state law claims set forth within the complaint."

The Federal Court issued a Conditional Order of Discontinuance dated January 22, 2003 and filed on January 24, 2003 which stated that "the parties have reached an agreement in principle to dismiss the state claims remaining in this action and to pursue them in a related case now pending in state court" and provided that the Federal court action was "conditionally discontinued without prejudice," permitting plaintiffs to apply by letter for restoration of the action with respect to the State law claims in the event a stipulation setting forth such agreement was not consummated within 30 days.

Thereafter, plaintiffs and defendant entered into a Stipulation of Dismissal filed on February 24, 2003. The parties noted in that stipulation that the Federal court "had previously stated that it would not exercise supplemental jurisdiction over plaintiffs' remaining state law claims if the sole remaining Federal claim was dismissed," and that the Federal court had issued the January 22, 2003 Conditional Order of Discontinuance, which dismissed such sole remaining Federal claim. It was stipulated and agreed by the parties that plaintiffs' remaining State law claims were "dismissed without prejudice to refiling them in state court," and that defendant "would not contend that the dismissal of the remaining state law claims . . . was 'by a voluntary discontinuance.'" It also specifically provided that plaintiffs "may commence a new action upon the same transaction or occurrence or series of transactions or occurrences in state court within six months from January 22, 2003 (the date of the Conditional Order of Discontinuance)."

By its instant motion, defendant seeks dismissal of plaintiffs' complaint, pursuant to CPLR 3211 (a) (5), based upon the doctrine of res judicata. Under the doctrine of res judicata, where there is a valid final judgment on the merits, in an action which arises out of the same transaction or series of transactions, involving the same parties or those in privity with them, a plaintiff will be barred from relitigating in a later action the claims which were raised or which could have been raised in the original action (*see O'Brien v City of Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 445 N.Y.S.2d 687 [1981]; *Gramatan Home Investors Corp. v Lopez*, 46 N.Y.2d 481, 485, 386 N.E.2d 1328, 414 N.Y.S.2d 308 [1979]; *Aard-Vark Agency v Prager*, 8 AD3d 508, 509, 779 N.Y.S.2d 213 [2004]; *Troy v Goord*, 300 A.D.2d 1086, 1086-1087, 752 N.Y.S.2d 460 [2002]; *Con-Solid Contr. Co. v Litwak Dev. Corp.*, 298 A.D.2d 544, 546, 748 N.Y.S.2d 788 [2002]). In support of its motion, defendant asserts that there are allegations in plaintiffs' breach of contract claim, reiterated in their conversion and unjust enrichment claims, that, in breach of its contract with plaintiffs, defendant has commenced selling newspapers to other carriers at lower prices and has refused to sell newspapers to plaintiffs at the same lower price being offered to other carriers. Citing to parallel allegations in plaintiffs' price discrimination claim in the Federal action which also allege that defendant "sold the [Daily] News to [other] carriers at lower prices than those sold to Plaintiffs", Defendant argues that the allegations in plaintiffs' present complaint are thus based upon the same allegations or arise out of the same transactions or occurrences as the Federal price discrimination claim which was dismissed by the January 6, 2003 Notice of Voluntary Dismissal in the Federal action and that the Notice of Voluntary Dismissal bars plaintiffs' instant complaint pursuant to the doctrine of res judicata.

While "a stipulation of discontinuance 'with prejudice' is afforded res judicata effect and will bar litigation of the discontinued causes of action" (*Van Hof v Town of Warwick*, 249 A.D.2d 382, 382, 671 N.Y.S.2d 144 [1998]; *see also Dolitsky's Dry Cleaners v Y L Jericho Dry Cleaners*, 203 A.D.2d 322, 322-323, 610 N.Y.S.2d 302 [1994]; *Rossi v Twinbogo Co.*, 193 A.D.2d 481, 483, 597 N.Y.S.2d 390 [1993]), here, plaintiffs' State law claims were [*4] not discontinued or dismissed with prejudice. As noted above, the January 6, 2003 Notice of Voluntary Dismissal explicitly addressed plaintiffs' State law claims, stating that it did not seek dismissal or withdrawal of these claims, and the January 22, 2003 Conditional Order of Dismissal noted the parties' agreement to pursue the State claims remaining in that action in State court.

The February 24, 2003 Stipulation of Dismissal plainly demonstrates that plaintiffs agreed to dismiss the State law claims against defendant solely with the understanding between them that they would be given the opportunity to refile these claims in State court within a period of six months from the date of the stipulation. The February 24, 2003 Stipulation of Dismissal, which was signed by both parties and "so ordered" by the Judge, contained express language, stating that plaintiffs' remaining State law claims were "dismissed without prejudice to refiling them in state court," and, thus, specifically reserved to plaintiffs the right to recommence these claims. In fact, as previously stated, defendant agreed therein that it would not contend that the dismissal of the State law claims in the Federal action was by a " voluntary discontinuance", and it agreed therein that plaintiffs may commence a new action in State court based upon the same series of transactions or occurrences.

The dismissal of plaintiffs' Federal secondary-line price discrimination claim did not have any effect upon plaintiffs' pending State law claims in the Federal action, which claims remained outstanding and not adjudicated at the time of the execution of the January 6, 2003 Notice of Voluntary Dismissal. The dismissal of the secondary-line price discrimination claim did not dispose of the State law claims which, as provided by the January 22, 2003 Conditional Order of Discontinuance, could have been restored to the active calendar of the Federal court if not for the execution of the February 24, 2003 Stipulation of Dismissal dismissing the State law claims without prejudice.

Moreover, the Federal claim for secondary line price discrimination under the Robinson-Patman Act did not encompass, but was entirely distinct from, plaintiff's State law claims in the Federal court action. As the District Court held, in order to sustain such price discrimination claim under the federal statute, plaintiffs were required to meet certain stringent requirements, showing that the sales at issue were made in interstate commerce, that the transactions involved the sale of comparable products or commodities to competing purchasers at discriminatory prices and that there was a prohibited effect on competition in the market. Plaintiffs need not meet these requirements in order to sustain their common law breach of contract claim. The Federal court, at no time, made any determinations as to the merits of plaintiffs' State law causes of action, and, thus, in the absence of any determination on the merits of plaintiffs' State law claims, which have yet to be adjudicated, such claims cannot be barred by the doctrine of res judicata (*see Van Hof*, 249 A.D.2d at 382-383; *Dolitsky's Dry Cleaners*, 203 A.D.2d at 323).

Defendant's further argument that the doctrine of collateral estoppel bars some of plaintiffs' claims, is similarly without merit. There was no "identity of issue which was necessarily . . . decided in the prior [Federal Court] action and is decisive of the present action," nor was there "a full and fair opportunity to contest the decision now said to be controlling" (*Schwartz v Public Administrator of County of Bronx*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 298 N.Y.S.2d 955 [1969]; *see also Bank v Brooklyn Law School*, 297 A.D.2d 770, 770, 747 N.Y.S.2d 800 [2002]). Contrary to defendant's assertion, the January 6, 2003 Notice of Voluntary Dismissal did not constitute a determination of issues in the Federal court action, which are decisive of plaintiffs' breach of contract claims herein. Consequently, defendant's motion, [*5] insofar as it seeks dismissal of plaintiffs' complaint, pursuant to CPLR 3211 (a) (5), as barred by the doctrines of res judicata and/or collateral estoppel, must be denied.

In support of its motion insofar as it seeks dismissal of plaintiffs' first cause of action for breach of contract, pursuant to CPLR 3013 and 3211 (a) (7), defendant asserts that plaintiffs' complaint fails to identify which plaintiffs - - the individuals or the corporations - - were parties to the alleged contracts with it. It contends that the lack of this essential element prevents it from having adequate notice of plaintiffs' claims. Defendant further claims that the complaint's allegations are vague and undifferentiated. Defendant argues that plaintiffs' breach of contract cause of action must, therefore, be dismissed, pursuant to CPLR 3013, for failure to plead with sufficient particularity to give the court and it "notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action", and, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action.

Defendant's argument is not convincing. Plaintiffs' complaint names the plaintiffs, alleges that plaintiffs were owners of defendant's franchises pursuant to

contract between defendant and its franchise dealers, and sets forth the terms of those contracts. Plaintiffs' complaint has thus been pleaded with sufficient particularity, pursuant to CPLR 3013, to adequately advise and apprise defendant of plaintiffs' claim against it, and embraces all of the relevant substantive elements of a breach of contract cause of action (*see Lane v Mercury Record Corp.*, 21 A.D.2d 602, 604, 252 N.Y.S.2d 1011 [1964], *affd* 18 N.Y.2d 889, 223 N.E.2d 35, 276 N.Y.S.2d 626 [1966]; *Foley v D'Agostino*, 21 A.D.2d 60, 63, 248 N.Y.S.2d 121 [1964]).

Furthermore, on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged in the complaint as true, and accord plaintiffs the benefit of every possible favorable inference (*Leon v Martinez,* 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; *Collins v Telcoa Intl. Corp.*, 283 A.D.2d 128, 131, 726 N.Y.S.2d 679 [2001]; *Waste Distillation Technology v Blasland & Bouck Engineers,* 136 A.D.2d 633, 633, 523 N.Y.S.2d 875 [1988]). Applying this standard, the court finds that plaintiffs have stated a viable cause of action for breach of contract. Thus, dismissal of plaintiffs' first cause of action for breach of contract must be denied.

With respect to defendant's motion seeking dismissal of plaintiffs' second cause of action for conversion, pursuant to CPLR 3211 (a) (7), it is well settled that "[a] claim to recover damages for conversion cannot be predicated on a mere breach of contract" (*Priolo Communications v MCI Telecommunications Corp.*, 248 A.D.2d 453, 454, 669 N.Y.S.2d 376 [1998]; *see also Wolf v National Council of Young Israel*, 264 A.D.2d 416, 417, 694 N.Y.S.2d 424 [1999]; *MBL Life Assurance Corp. v 555 Realty Co.*, 240 A.D.2d 375, 376-377, 658 N.Y.S.2d 122 [1997]; *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 A.D.2d 883, 884, 452 N.Y.S.2d 599 [1982]). Where a conversion claim is "duplicative of the breach of contract cause of action," it must be dismissed (*Retty Financing v Morgan Stanley Dean Witter & Co.*, 293 A.D.2d 341, 341, 740 N.Y.S.2d 198 [2002]).

Plaintiffs' second cause of action for conversion, in paragraph 38 of their complaint, repeats and reiterates the allegations contained in their first cause of action for breach of contract, and then alleges, in paragraph 39, that "defendant has implemented a pay-by-mail system through which it has commenced billing the plaintiffs [sic] customers directly, and thereby collecting fees and gratuities which are monies properly due and owing to the plaintiffs and/or their agents." It alleges, in paragraphs 40 and 41, that despite repeated demands by plaintiffs that defendant deliver these monies to them, defendant has failed to do so, and that these monies have been wrongfully converted by defendant. These paragraphs are virtually a verbatim repetition of paragraphs 25 and 27 of plaintiffs' first cause of action for breach of contract, which similarly alleges, respectively, that [*6] defendant directly breached its contract with plaintiff by unilaterally implementing the pay-by-mail system and thereby took monies which belong to plaintiffs, and by wrongfully obtaining gratuities from plaintiffs' customers. In fact, plaintiffs even use the words "conversion" and "converted" in their breach of contract cause of action.

Plaintiffs argue that their conversion claim is separate and distinct from their breach of contract claim because the tips and gratuities wrongfully collected and withheld by defendant were not part of the contractual agreement between the parties. Paragraph 27 of the complaint (which, as noted above, mirrors plaintiffs' conversion claim), however, plainly belies this argument since, in setting forth plaintiffs' breach of contract cause of action, it specifically and expressly alleges that defendant, "*in further breach of its contracts with . . . plaintiffs* . . . has wrongfully obtained from . . . plaintiffs' customers, and converted for its own use, gratuities which were intended for newspaper boys and girls employed by plaintiffs" (emphasis supplied). No factual basis for plaintiffs' cause of action for conversion has been pleaded other than the terms of the contract.

Additionally, plaintiffs have failed to allege that they had "ownership, possession or control of the money" before its conversion, as required for a conversion claim (*see Peters Griffin Woodward, Inc.*, 88 A.D.2d at 884). While plaintiffs assert that they were the rightful owners of the tips and gratuities which their customers forwarded to defendant, it is noted that, as defendant points out, the complaint alleges that the gratuities "were intended for newspaper boys and girls employed by plaintiffs" rather than for plaintiffs. Although plaintiffs assert, in their opposition papers, that many of them delivered their own papers, this is not alleged in the complaint. In addition, while plaintiffs state that they paid their delivery boys and girls additional monies to replace the gratuities lost by them, this would not be a basis upon which plaintiffs could predicate their claim for conversion against defendant. These very same allegations with regard to their replacement of their delivery persons' loss of gratuities is set forth in their breach of contract cause of action as being "in further breach" of defendant's contract with plaintiffs, and is, therefore, redundant of their breach of contract claim and the damages claimed thereunder.

Thus, inasmuch as plaintiffs predicate their conversion cause of action upon the identical allegations upon which their breach of contract cause of action is based, plaintiffs' "claim alleging conversion merely restates [their] cause of action to recover damages for breach of contract and does not allege a separate taking"

(*Priolo Communications*, 248 A.D.2d at 454). Plaintiffs' conversion claim covers only what their complaint alleges was an express contractual obligation; the conversion claim "does not stem from a wrong which is independent of the alleged breach" of the contracts (*Wolf*, 246 A.D.2d at 417). Therefore, plaintiffs cannot recast their contract claim as a cause of action in tort for conversion, and their duplicative conversion claim must be dismissed (*see* CPLR 3211 [a] [7]; *Wolf*, 264 A.D.2d at 417; *Priolo Communications*, 248 A.D.2d at 454; *MBL Life Assurance Corp.*, 240 A.D.2d at 376-377; *Peters Griffin Woodward, Inc.*, 88 A.D.2d at 884).

With respect to defendant's motion insofar as it seeks dismissal of plaintiffs' third cause of action for unjust enrichment for failure to state a cause of action, the court notes that it is well established that "[a] party may not recover based on the theory of unjust enrichment where there is a valid express agreement between the parties which explicitly covers the same subject matter for which the relief sounding in quasi-contract is sought" (*Smith v Pagano*, 154 A.D.2d 586, 587, 546 N.Y.S.2d 415 [1989]; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 N.Y.2d 382, 388, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]; *Chadirjian v Kanian*, 123 A.D.2d 596, 598, 506 N.Y.S.2d 880 [1986]). [*7]

Plaintiffs assert that they have provided many services to defendant in which a benefit to defendant was derived, such as billing customers, collecting monies, advertising, seeking out new customers, and delivering newspapers on defendant's behalf; that they were not adequately compensated for these services; and that many of these services were outside the scope of the contracts entered into between them and defendant. They argue that this permits them to maintain an unjust enrichment claim, along with their breach of contract claim. It does not appear however from the allegations in the complaint that plaintiffs provided any services which were outside the scope of the contracts (*compare Rab Contractors v Stillman*, 266 A.D.2d 70, 71, 698 N.Y.S.2d 454 [1999]). Rather, the unjust enrichment claim is based upon the very same subject matter as the breach of contract cause of action, and nothing is alleged in the unjust enrichment claim that is not alleged in the breach of contract cause of action.

Plaintiffs' unjust enrichment cause of action merely incorporates the breach of contract allegations and then simply adds the allegation that defendant has been unjustly enriched at the expense of plaintiffs and their agents by virtue of "having directly billed . . . plaintiffs' customers and thereby collecting and retaining monies [from them] to which [it] possesses no lawful claim." This allegation is fully covered by the allegation in plaintiffs' breach of contract cause of action that the explicit terms of plaintiffs' franchise contracts with plaintiffs provide that plaintiffs "possess the sole and exclusive right to determine the mode and manner in which the collection of all monies, shall be made," and that defendant collected these monies for its own use and refused to give them to plaintiffs. Thus, since there is no bona fide dispute as to the existence of valid and enforceable written contracts which govern this dispute and explicitly cover the same subject matter for which plaintiffs seek to recover based upon a claim of unjust enrichment, they cannot assert such unjust enrichment claim (*see Cherry v Resource Am.*, 285 A.D.2d 989, 991, 727 N.Y.S.2d 848 [2001]).

Furthermore, the theory of unjust enrichment "is equitable in nature" (*Manufacturers Hanover Trust Co. v Chemical Bank*, 160 A.D.2d 113, 117, 559 N.Y.S.2d 704 [1990]), and "equity will not entertain jurisdiction where there is an adequate remedy at law (*Boyle v Kelley*, 42 N.Y.2d 88, 91, 365 N.E.2d 866, 396 N.Y.S.2d 834 [1977]). Plaintiffs have failed to plead that no adequate remedy at law exists, and they could not support any such allegation.

Plaintiffs' argument that it would be premature to dismiss their unjust enrichment cause of action because they are unsure of how the scope and applicability of the written contracts will be interpreted by the court, is rejected. If the contracts are not ultimately construed in plaintiffs' favor, this does not afford plaintiffs a cause of action for unjust enrichment since such contracts nevertheless would be dispositive of plaintiffs' right to recovery (*see Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 388; *Smith*, 154 A.D.2d at 587). Thus, dismissal of plaintiffs' third cause of action for unjust enrichment is mandated (*see* CPLR 3211 [a] [7]; *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 388; *Cherry*, 285 A.D.2d at 991; *Smith*, 154 A.D.2d at 587; *Chadirjian*, 123 A.D.2d at 598).

Defendant also seeks to dismiss plaintiffs' complaint with respect to plaintiff George Alysandratos (Alysandratos). It argues that such dismissal is required because, although Alysandratos is explicitly named as a plaintiff in the caption of the action, the body of the complaint fails to specifically mention his name as an individual engaged in the business of newspaper delivery, as it does with the other plaintiffs. It is noted that plaintiffs assert that this was simply an inadvertent error.

[*8] Defendant's argument is unavailing. Since Alysandratos is named in the caption as a plaintiff, he is encompassed within the complaint's allegations with respect to "plaintiffs." Therefore, since defendant was properly apprised of Alysandratos' existence within this litigation by his inclusion as one of the named plaintiffs within the caption and by the description of the

"plaintiffs'" claims throughout the body of the complaint, this irregularity has not prejudiced any substantial right of defendant, and, at this early stage of the action, it may be disregarded or corrected (*see* CPLR 2001).

Defendant's argument that Alysandratos had no contract upon which to base a claim and that the absence of a specific allegation with respect to him is not a technical defect which may be disregarded or corrected under CPLR 2001, but a substantive failure requiring dismissal of his claim, is premature on this motion pursuant to CPLR § 3211. As discussed above, the complaint specifically alleges that "each of the plaintiffs herein are owners of . . . Daily News franchises," that defendant entered into franchise contracts with plaintiffs, and that defendant breached these contracts. At this pleading stage of the action, plaintiffs' allegations must be presumed to be true and accorded every favorable inference (*see* *Leon*, 84 N.Y.2d at 87-88; *Telcoa Intl. Corp.*, 283 A.D.2d at 131; *Waste Distillation Technology*, 136 A.D.2d at 633), and defendant has made no affirmative showing of an absence of a contract between it and Alysandratos. Consequently, dismissal of the complaint with respect to Alysandratos' claim is not warranted.

Accordingly, defendant's motion is granted to the extent that plaintiffs' second cause of action for conversion and third cause of action for unjust enrichment are dismissed, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Defendant's motion is denied insofar as it seeks to dismiss plaintiffs' first cause of action for breach of contract.

The parties shall appear before this Court for conference at 9:45 a.m. on March 9, 2005.

This constitutes the decision and order of the court.

LEXSEE

CITIZENS INSURANCE COMPANY, subrogee of KIM'S OF NOVI, INC. d/b/a KIM'S GARDEN, Plaintiff-Appellant, v OSMOSE WOOD PRESERVING, INC., Defendant-Appellee.

No. 200763

COURT OF APPEALS OF MICHIGAN

231 Mich. App. 40; 585 N.W.2d 314; 1998 Mich. App. LEXIS 219; CCH Prod. Liab. Rep. P15,312; 37 U.C.C. Rep. Serv. 2d (Callaghan) 97

March 10, 1998, Submitted
July 31, 1998, Decided

PRIOR HISTORY: [***1] Oakland Circuit Court. LC No. 95-490772-NP.

DISPOSITION: Affirmed.

COUNSEL: Buesser, Buesser, Black, Lynch, Fryhoff & Graham, P.C. (by John L. Hopkins, Jr.), for the plaintiff. Bloomfield Hills.

Plunkett & Cooney, P.C. (by Ernest R. Bazzana) for the defendant. Detroit.

JUDGES: Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ. Doctoroff, J., concurred. KELLY, J., (dissenting).

OPINION BY: Robert P. Young, Jr.

OPINION

[*41] [**315] YOUNG, Jr., P.J.

This case involves a dispute regarding liability for the collapse of the roof of a restaurant owned and operated by Kim's of Novi (Kim's). It is alleged that the collapse was caused by the deterioration of wood roofing materials that were adversely affected by flame-retardant chemicals manufactured by defendant. Plaintiff, Kim's subrogee, insured the restaurant and paid in excess of $500,000 for the loss. Plaintiff sought, in turn, to recover the loss from defendant and initiated this lawsuit. The trial court determined that plaintiff's exclusive remedy was under the Uniform Commercial Code (UCC), MCL 440.1101 *et seq.*, MSA19.1101 *et seq.*, and that its cause of action was barred by the UCC's four-year statute of limitations, [***2] MCL 440.2725; MSA 19.2725. Plaintiff appeals as of right from the court's subsequent order granting summary disposition to defendant pursuant to MCR 2.116(C)(7). We affirm.

I. Factual and Procedural Background

Kim's owned and operated a restaurant in Novi, Michigan. During the original 1978 construction, the [*42] builders installed wood trusses and plywood roof decking that had been treated for flame retardancy using chemicals manufactured by defendant. In 1982, Kim's had an addition to the building constructed. The roofing materials that were installed at that time had also been treated for flame retardancy using defendant's chemicals. Apparently, the wood was treated by a subcontractor according to instructions provided by defendant Plaintiff's complaint alleged that on January 27 and 29, 1994, the wood trusses and plywood roof decking utilized in the 1978 and 1982 construction deteriorated and collapsed, "causing extensive damage to Plaintiff's subrogor's real and business personal property." Pursuant to its insurance policy with Kim's, plaintiff paid $ 556,111.68 for damages caused by the collapse.

In January 1995, plaintiff initiated the instant lawsuit against defendant, [***3] among others, alleging negligence, breach of warranty, and fraud. Defendant filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendant argued that, because plaintiff's claim arose from the commercial sale of goods and only economic damages were sought, the UCC provided plaintiff's exclusive remedy. Further, defendant argued that plaintiff's cause of action under the UCC was barred by the UCC's four-year limitation period. [1] The trial court agreed and granted summary disposition to defendant.

1 Under Article 2 of the UCC, the purchaser of defective goods may recover for economic loss

> and incidental and consequential damages provided the action to recover is brought within four years of tender of delivery of the goods, regardless of the time of discovery of the breach. MCL 440.2725; MSA 19.2725; *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich. App. 522, 526; 538 N.W.2d 424 (1995).

[*43] II. Standard of Review

A trial court's grant or denial of summary disposition [***4] will be reviewed de novo. *Michigan Mut Ins Co v Dowell,* 204 Mich. App. 81, 86; 514 N.W.2d 185 (1994). When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor. *Witherspoon v Guilford,* 203 Mich. App. 240, 243; 511 N.W.2d 720 (1994). The court must also consider the affidavits, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(5); *Patterson v Kleiman,* 447 Mich. 429, 432-434; 526 N.W.2d 879 (1994). If there are no facts in dispute, whether the claim is statutorily barred is a question of law. *Witherspoon, supra* at 243.

III. Analysis

In *Neibarger v Universal Cooperatives, Inc,* 439 Mich. 512, 527-528; 486 N.W.2d 612 (1992), our Supreme Court expressly adopted the "economic loss doctrine" and held that "where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations." The *Neibarger* Court explained that the doctrine

> [**316] [***5] hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which [*44] has traditionally been remedied by resort to the law of torts. [*Neibarger*, 439 Mich. at 520-521.]

Unlike some jurisdictions, the economic loss doctrine applies in Michigan even when the plaintiff is seeking to recover for property other than the product itself. *Id.* at 530.

Plaintiff argues that the economic loss doctrine should not apply in this case because, unlike the facts in *Neibarger,* (1) there was no contractual relationship between Kim's and defendant, (2) Kim's was not in a position to negotiate the terms of the sale, (3) the fire-retardant-treated wood was not directly related to Kims' business, and (4) Kim's could not have anticipated such an "unforeseeable disaster." However, we do not believe that the express Neibarger holding can be avoided simply by distinguishing *Neibarger* on its facts. Indeed, the following explanation from *Neibarger* demonstrates [***6] the broad scope of the Court's holding:

> If a commercial purchaser were allowed to sue in tort to recover economic loss, the UCC provisions designed to govern such disputes, which allow limitation or elimination of warranties and consequential damages, require notice to the seller, and limit the time in which such a suit must be filed, could be entirely avoided. In that event, Article 2 would be rendered meaningless and, as stated by the [United States] Supreme Court in *[East River Steamship Corp v Transamerica Delaval, Inc,* 476 U.S. 858, 866; 106 S. Ct. 2295; 90 L. Ed. 2d 865 (1986)], "contract law would drown in a sea of tort."
>
> . . . Adoption of the economic loss doctrine will allow sellers to predict with greater certainty their potential liability for product failure and to incorporate those predictions into the price or terms of the sale. *[Neibarger, supra* at 528.]

[*45] Moreover, as plaintiff concedes, in both *Sullivan Industries, Inc v Double Seal Glass Co, Inc,* 192 Mich. App. 333; 480 N.W.2d 623 (1991), and *Freeman v DEC Int'l, Inc,* 212 Mich. App. 34; 536 N.W.2d 815 (1995), this Court expressly rejected the argument that the economic [***7] loss doctrine does not apply in the absence of privity of contract. We are bound to follow those decisions under MCR 7.215(H). Accordingly, because Kim's is a commercial business and the wood treated with defendant's chemicals was purchased for commercial purposes, and because the damage to the restaurant was purely economic, under *Neibarger,* the UCC provides the exclusive remedy.

Plaintiff also contends that the UCC is inapplicable in this case because defendant provided a service rather than a good. Plaintiff claims, and the dissent agrees, that the transactions at issue were primarily for services, not

goods. We find plaintiff's position to be without merit. Michigan applies the "predominant factor test" to determine whether a contract primarily involves a sale of goods, actionable under the UCC, or a sale of services, actionable under general common-law principles. *Home Ins Co v Detroit Fire Extinguisher Co, Inc,* 212 Mich. App. 522, 526-527; 538 N.W.2d 424 (1995).

The problem with plaintiff's argument is that it misapprehends *defendant's* role in the transactions at issue: defendant merely provided the chemicals and accompanying instructions used by *another* company [***8] to treat the wood installed in Kims' restaurant. importantly, we note that defendant is being sued only as a *manufacturer*. Accordingly, this Court's decision in *Frommert v Bobson Constr Co,* 219 Mich. App. 735; 558 N.W.2d 239 (1996), upon which the dissent relies, [*46] is wholly inapposite. Because defendant provided only its wood-treatment product that, in turn, was applied to the wood used in the trusses and roof decking, we conclude that plaintiff's causes of action against defendant are governed by the UCC. [2]

> 2 The dissent views the "transaction" at issue as the building of the restaurant and subsequent addition and thus as one analogous to the installation of the faulty roof in *Frommert, supra.* For the reasons stated in the text, whether the construction of the restaurant and addition can reasonably be viewed as the provision of services rather than goods is irrelevant to *defendant's* role. As noted, defendant was sued as a manufacturer of defective wood-treatment products and its only connection to the collapsed roof is that its products were purchased and apparently applied to wood used by the persons who erected the restaurant and addition.

[***9] [**317] Finally, plaintiff argues that even if the economic loss doctrine applies, it should nevertheless be permitted to pursue its claim of fraud in the inducement, which is a recognized exception to the economic loss doctrine. *Huron Tool & Engineering Co v Precision Consulting Services, Inc,* 209 Mich. App. 365, 371-374, 532 N.W.2d 541 (1995).

> Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely--which normally would constitute grounds for invoking the economic loss doctrine--but where in fact the ability of one party to negotiate fair terms is undermined by the other party's [precontractual] fraudulent behavior. [209 Mich. App. at 372-373.]

Plaintiff claims that Kim's was fraudulently induced into purchasing wood building materials treated with defendant's fire-retardant chemicals because defendant made fraudulent representations about the suitability of using its treated wood in commercial building construction. However, we agree with the trial court that the misrepresentations alleged by plaintiff relate solely to the quality and characteristics of [*47] defendant's flame-retardant chemicals. In [***10] essence, plaintiff's fraud claim is merely a restatement of its breach of warranty claim. See *id.* at 375. Consequently, plaintiff's fraud claim does not fall outside the ambit of the economic loss doctrine, and plaintiff is restricted to its UCC remedies.

For these reasons, we conclude that plaintiff's causes of action are governed by the UCC. Moreover, because it is clear that plaintiff's claims are precluded by the UCC's four-year statute of limitations, the trial court properly granted summary disposition to defendant.

Affirmed.

Doctoroff, J., concurred.

/s/ Robert P. Young, Jr.

/s/ Martin M Doctoroff

DISSENT BY: Michael J. Kelly

DISSENT

KELLY, J., *(dissenting).*

I respectfully dissent.

In *Neibarger v Universal Cooperatives, Inc,* 439 Mich. 512, 527-528; 486 N.W.2d 612 (1992), our Supreme Court adopted the "economic loss doctrine" and held that where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the Uniform Commercial Code (UCC), and its statute of limitations applies. See also *Frommert v Bobson Constr Co,* 219 Mich. App. 735, 737-738; 558 N.W.2d [***11] 239 (1996). An injury caused by a service, however, would not arise out of a "transaction in goods" and would not be governed by the UCC. *Neibarger, supra,* p 533; *Frommert, supra,* p 738. The test for determining whether contracts for mixed goods and services are governed by the UCC is as follows:

[*48]

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved. [*Neibarger, supra,* p 534, adopting the test set forth in *Bonebrake v Cox,* 499 F.2d 951, 960 (CA 8, 1974).]

In my opinion, the transaction between the parties involved services, not goods. *Frommert,* 219 Mich. App. at 738-739. Kim's, a Chinese restaurant, contracted with others to erect an addition to its restaurant. Hence, the essence of the contract(s) with the architects and builders was for services, not goods. Defendant also provided a service; it developed the flame retardancy chemical formula that was applied to the lumber used to [***12] build the addition to Kim's restaurant. The goods purchased by Kim's, the trusses and plywood roof decking, were merely incidental to the erection of the addition to the restaurant. As in *Frommert,* the wood trusses and plywood roof decking would have been of no value unless they were [**318] installed. Therefore, I conclude that the transaction between the parties was predominantly one for services, rather than for a sale of goods, and was not subject to Article 2 of the UCC. Under these circumstances, the four-year statute of limitations in Article 2 of the UCC does not apply. *Frommert, supra,* p 739.

Moreover, I do not believe that the *Neibarger* rationale should be applied in cases such as this. Unlike the plaintiffs in *Neibarger* who were in the dairy business and knew the foreseeable consequences of the failure of the milking-machine systems developed by defendants, Kim's restaurant was not in the lumber business and did not deal in goods such as fire-retardant-treated [*49] lumber. Therefore, the foreseeability of the risks involved with chemically treated lumber would not have been nearly as apparent to Kim's, a Chinese restaurant, as were the risks involved [***13] in the milking-machine systems to the plaintiffs in Neibarger who were in the dairy business. The goods and services in this case, unlike in *Neibarger,* were merely incidental to Kim's restaurant business. Hence, this was more like a consumer transaction to which the UCC would not apply.

I would reverse.

/s/ Michael J. Kelly

/s/ Robert P. Young, Jr.

/s/ Martin M. Doctoroff

LEXSEE

Cooper, Bamundo, Hecht & Longworth, LLP, Respondent, v. Gregory Kuczinski et al., Appellants.

2003-11151, (Index No. 7605/03)

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

14 A.D.3d 644; 789 N.Y.S.2d 508; 2005 N.Y. App. Div. LEXIS 850

January 4, 2005, Argued
January 31, 2005, Decided

COUNSEL: Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, N.Y. (Thomas A. Leghorn and Brett A. Scher of counsel), for appellants.

Steven L. Levitt & Associates, P.C., Williston Park, N.Y. (James J. Daw, Jr., and Irene Tenedios of counsel), for respondent.

JUDGES: BARRY A. COZIER, J.P., DAVID S. RITTER, DANIEL F. LUCIANO, ROBERT A. LIFSON, JJ. COZIER, J.P., RITTER, LUCIANO and LIFSON, JJ., concur.

OPINION

[*644] [**509] In an action, inter alia, to recover damages for breach of contract and to impose a constructive trust upon certain assets of the defendants, the defendants appeal from so much of an order of the Supreme Court, Kings County (Garry, J.), dated October 13, 2003, as granted those branches of the plaintiff's motion which were to impose a constructive trust upon certain of their assets, to provide an accounting as to certain fees, to compel discovery as to certain pending cases, and to provide all closing statements filed with the Office of Court Administration as to certain cases, and denied those branches of the defendants' motion which were to dismiss the [***2] plaintiffs' causes of action sounding in breach of contract, unjust enrichment, quantum meruit, for an accounting, and to impose a constructive trust.

Ordered that the order is modified, on the law, by deleting the provision thereof denying those branches of the defendants' motion which were to dismiss the causes of action sounding in unjust enrichment and quantum meruit and substituting therefor a provision granting those branches of the defendants' [*645] motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The defendant Gregory Kuczinski, a former employee of the plaintiff, was fired after he allegedly solicited the plaintiff's clients for his own legal practice. The plaintiff commenced an action (hereinafter the prior litigation) to recover damages, inter alia, for breach of contract, against, amongst others, Kuczinski and his professional corporation, the defendant Kuczinski & Associates, P.C. The parties entered into a settlement agreement (hereinafter the agreement) which resolved and settled "the termination of their employment agreement and distribution of file and fee disputes" and which resulted in a stipulation of discontinuance [***3] of the prior litigation.

After the defendants allegedly failed to remit to the plaintiff the portion of fees to [**510] which it was entitled under the agreement, the plaintiff commenced this action, inter alia, to recover damages for breach of contract and to impose a constructive trust.

To impose a constructive trust, a plaintiff must set forth the following elements: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment" (*Sharp v Kosmalski*, 40 N.Y.2d 119, 121, 351 N.E.2d 721, 386 N.Y.S.2d 72 [1976]; *see Levy v Moran*, 270 A.D.2d 314, 315, 704 N.Y.S.2d 609 [2000]). Here, the plaintiff established its entitlement to a constructive trust and the defendants failed to present any evidence to refute such showing. Therefore, the Supreme Court properly granted that branch of the plaintiff's motion which was to impose a constructive trust and denied that branch of the defendants' motion which was to dismiss that cause of action.

Contrary to the defendants' contention, the agreement between the parties fell within the purview of

Code of Professional Responsibility DR 2-107 (b) (22 NYCRR 1200.12 [b]) and was not subject to the prohibition [***4] against fee-splitting among unaffiliated attorneys as set forth in Code of Professional Responsibility DR 2-107 (a) (22 NYCRR 1200.12[a]) (*see Hendler & Murray v Lambert,* 147 A.D.2d 442, 147 A.D.2d 444, 446, 537 N.Y.S.2d 560 [1989]). Therefore, the Supreme Court correctly denied that branch of the defendants' motion which was to dismiss the plaintiff's cause of action sounding in breach of contract.

However, the Supreme Court erred in denying that branch of the defendants' motion which was to dismiss the cause of action sounding in unjust enrichment since it was duplicative of the cause of action to recover damages for breach of contract (*see Bettan v Geico Gen. Ins. Co.,* 296 A.D.2d 469, 470, 745 N.Y.S.2d 545 [2002]; *Poppe Gen. Contr. v Town of Ramapo,* 280 A.D.2d 667, 668, 721 N.Y.S.2d 248 [2001]). [*646] Similarly, the Supreme Court erred in denying that branch of the defendants' motion which was to dismiss the cause of action sounding in quantum meruit since the existence of an express contract between the parties governing the particular subject matter precludes recovery under such a theory (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 N.Y.2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]; *Mucerino v Firetector, Inc.,* 306 A.D.2d 330, 332, 761 N.Y.S.2d 269 [2003]). [***5]

The defendants' remaining contentions are without merit. Cozier, J.P., Ritter, Luciano and Lifson, JJ., concur.

LEXSEE

ROBERT R. DEAN, JENNIFER P. DEAN, AND MARY SUE DEAN, PLAINTIFFS-APPELLANTS, v. BARRETT HOMES, INC., LINCOLN WOOD PRODUCTS, INC., STO OF NEW JERSEY, INC., STO EASTERN, INC., ARCHITECTURAL EXTERIOR FINISHES, INC., AND HOUSEMASTER, INC., DEFENDANTS, AND STO CORP., DEFENDANT-RESPONDENT.

DOCKET NO. A-1479-07T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

406 N.J. Super. 453; 968 A.2d 192; 2009 N.J. Super. LEXIS 81

September 22, 2008, Argued
April 15, 2009, Decided

SUBSEQUENT HISTORY: [***1]
Approved for Publication April 15, 2009.
Certification granted by Dean v. Barrett Homes, 2009 N.J. LEXIS 875 (N.J., July 13, 2009)

PRIOR HISTORY: On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-8451-04.

COUNSEL: *Peter L. Davidson* argued the cause for appellants (*Davidson Legal Group, LLC*, attorneys; *Mr. Davidson* and *Kenneth A. Spassione, Jr.*, on the brief).

David N. Cohen argued the cause for respondent (*Edwards, Angell, Palmer & Dodge, LLP*, attorneys; *Mr. Cohen*, *Andrew P. Fishkin* and *Robert Benacchio*, on the brief).

JUDGES: Before Judges CARCHMAN, SABATINO and SIMONELLI. The judgment of the court was delivered in an opinion by CARCHMAN, P.J.A.D. SABATINO, J.A.D., concurring in the judgment. Judge SIMONELLI joins in this concurring opinion.

OPINION BY: CARCHMAN

OPINION

[*454] [**193] The judgment of the court was delivered in an opinion by

[*455] CARCHMAN, P.J.A.D.

Plaintiffs Robert R. Dean (Robert), [1] Jennifer P. Dean (Jennifer) and Mary Sue Dean appeal from a final judgment of the Law Division dismissing their complaint against Sto Corp. [2] (Sto). The claims arise as a result of damages caused by the manufacture and installation of allegedly defective exterior siding that was used on a house purchased by plaintiffs from the original owners. Plaintiffs asserted two primary causes of action--a claim under the [***2] Consumer Fraud Act (CFA), *N.J.S.A.* 56:8-1 to -184, and the Products Liability Act (PLA), *N.J.S.A.* 2A:58C-1 to -11. The motion judge granted summary judgment to defendant Sto as to both causes of action. We affirm.

1 For ease of reference, we will refer to the individual plaintiffs by their first names.

2 Other defendants were named in the action but the appeal is limited to the claims against defendant Sto Corp. According to plaintiffs' brief, plaintiffs have entered into settlement agreements with the other defendants. Our references to defendant, refer only to Sto unless otherwise indicated.

These are the relevant facts derived from the record. On February 18, 2002, Robert and Jennifer entered into a contract for the purchase of a house located at 7 Rechtenwald Court in Old Tappan. The sellers were Angelo and Maria Messina (the Messinas), the original owners, who had purchased the house in 1995 from defendant Barrett Homes Inc. (Barrett).

Sto was the manufacturer of the exterior siding product used on the house. Barrett had subcontracted the siding work to defendant Architectural Exterior Finishes. William E. Borra, Jr., Barrett's representative, claimed only that Sto had brought him some [***3] samples of the siding product for him to examine, and no other representations were made to Barrett regarding the siding.

The Messinas neither had any problem with the house nor were familiar with the stucco material used on the house's exterior. Although the builder may have provided them with some literature regarding the siding, they did not read it, and they never [*456] discussed the siding with Barrett or Sto. The Messinas never told plaintiffs that the exterior was maintenance-free, and they never gave plaintiffs any documents or literature regarding the exterior siding.

Likewise, plaintiffs' realtor never spoke to or gave any information to plaintiffs regarding the product used on the exterior of the house. Prior to closing, plaintiffs never gave any thought to the exterior of the house, other than to assume it was "stucco" and maintenance-free, even though no one had made that representation to them. They neither asked for nor received any information from Sto, and they never received any warranties regarding the exterior of the house.

Plaintiffs did act affirmatively to protect their investment in the house. On February 26, 2002, plaintiffs secured a house inspection performed by defendant [***4] HouseMaster, [**194] Inc. Prior to the inspection, plaintiffs learned that their insurance carrier would not insure a house with stucco. When Robert mentioned this to the inspector, the inspector said that the carrier was probably worried about a cable company or phone installer punching a hole in the siding, which could allow water that could not be immediately seen, to get behind it. He told Robert to make sure that all holes were caulked. Otherwise, according to the inspector, the siding on the house was an excellent insulator.

The inspector also told Robert that the siding was an Exterior Insulation Finishing System (EIFS), an unfamiliar term to plaintiffs. Plaintiffs admitted that, even after they learned that their house was clad with EIFS, they did no research on the product or the manufacturer. Robert claimed that there was no need to do any research because he could tell by his observations that the house did not require any painting.

In its report, which plaintiffs admitted they did not read in any great detail, HouseMaster warned: "While no visible defects were noted, this type siding [sic] can be prone to hidden defects. Keep siding/stucco well sealed and seal as req'd, such as at [***5] siding penetrations for lawn sprinkler control wiring and at bruised area [*457] near the ground behind downspout." Robert concluded that this statement was consistent with his conversation with the HouseMaster inspector, and that there was nothing to worry about. However, the report also stated that:

> Exterior Insulation Finish Systems (EIFS) incorporate foam insulation panels, reinforced mesh and a textured finished coating. *Certain products and/or installation methods make this wall-cladding system highly susceptible to moisture infiltration and subsequent structural damage and mold particularly at penetrations, joints, and roof terminations. Recommend evaluation by a specialist and/or the manufacturer as a precaution*.
>
> [(Emphasis added).]

Robert conceded that this cautionary statement was not consistent with what he had been told by the HouseMaster inspector, and he took no action in response to this report.

Plaintiffs took title to the house on May 14, 2002. At closing, the Messinas told plaintiffs that there was a bucket of "Sto" in the garage that had been left by the builder in case they needed it for a "touch-up." Plaintiffs assumed that "Sto" [***6] was the manufacturer of the exterior product.

Approximately one year after moving in, plaintiffs began to notice black lines over the exterior of the house. Jennifer thought she could use the material in the bucket to touch it up, but when she called the manufacturer or distributor, she learned that she could not simply paint the material on but needed to follow "a process." A family member then told plaintiffs that he had seen a news report regarding the hidden dangers of stucco. Despite the earlier warning from the home inspector, Robert finally did some research and learned that there had been many problems with other houses that had been finished with EIFS.

EIFS is an "exterior cladding component of the building envelope" and is not sold as a final product. The "traditional" EIFS consists of:

> (1) an adhesive; (2) expanded polystyrene ("EPS") board; (3) base coat; (4) reinforcing mesh; and (5) finish coat. The mesh is sold in rolls, EPS board sold in large sheets, and the adhesive, base and finish coats sold in buckets. The EPS board and mesh are cut and sized by the contractors usually at the [**195] jobsite, and the [*458] adhesive, base coat and finish coat are applied with the EPS board and mesh [***7] to the building by the contractors.

According to plaintiffs, the defect in defendant's product was that "[t]here [was] no secondary weather protection behind the cladding to protect the underlying moisture sensitive substrate and no means of drainage of water which may penetrate the wall assembly." Their expert found that plaintiffs had sustained water damage to the wall sheathing and framing of their house due to water intrusion behind the EIFS cladding. The expert found fifteen deficiencies in the installation of the EIFS that had caused this water intrusion. In addition, the expert found that the EIFS itself was defectively designed, because: "Standard installation specifications, details, and instructions by EIFS manufacturers did not adequately address actual field conditions encountered and also required installation that could not be achieved."

Plaintiffs were advised to undertake the following remediation to their house: "Removal of the EIFS, repairs to water-damaged structural components, installation of new cladding, windows and doors, and repairs to improperly installed and constructed building components should be performed as soon as possible due to the ongoing water intrusion."

Ultimately, [***8] plaintiffs removed and replaced their exterior siding, at a cost approximating $ 65,000. In addition, they spent another $ 85,000 to do the consequential work associated with this removal and replacement. This additional work included repairs to the interior of the house, replacement of their fireplace, repairs to the roof and soffits, and installation of new windows and doors. However, plaintiffs admitted that the fireplace work had nothing to do with the removal of the EIFS. They claimed damage to the underlying sheathing, framing and substrate of the house.

In addition, although toxic mold was found inside plaintiffs' house, they did not pursue any personal injury claim against defendant. Also, they admitted that they did not perform any work on the interior of the house to remediate or eliminate the mold, that no personal property in the house was damaged, and [*459] that no landscaping required any replacement. Jennifer claimed that there was a "stigma" associated with the mold, as well as a diminution in the value of their home, although she could not state whether the house had in fact decreased in value.

Plaintiffs filed a complaint in the Law Division against Barrett, Sto, HouseMaster [***9] and Architectural and others, alleging, among other causes of action, negligence, breach of implied and express warranties, consumer fraud and strict liability. Following extensive discovery, Sto filed a motion for summary judgment.

In opposition to summary judgment, plaintiffs presented an array of materials that supported their position that defendant was aware of the defects and problems with their EIFS since at least the 1980s, that they were responsible for selling and distributing the EIFS and putting it into the stream of commerce, and that they had been engaged in a great deal of litigation regarding their EIFS, both here in New Jersey and in other states.

The trial judge dismissed plaintiffs' claims for strict liability and negligence because he found that plaintiffs had sustained an "economic loss" only. That is, defendant's product was defective and had to be removed, which may have caused some incidental or consequential damage to plaintiffs' house, but the house itself was not destroyed, was not rendered unsafe or [**196] uninhabitable, and plaintiffs had not sustained any personal injuries. He dismissed their CFA claim because defendant had no contact whatsoever with plaintiffs [***10] and made no misrepresentations to them. Plaintiffs' motion for reconsideration also was denied.

On appeal, plaintiffs assert that the motion judge erred by improperly applying the economic loss rule, resulting in dismissal of plaintiffs' tort claim, and further erred in concluding that the CFA did not apply.

Subsequent to oral argument in this matter, we decided *Marrone v. Greer & Polman Const., Inc.*, 405 N.J. Super. 288, 964 A.2d 330 (App.Div.2009), where, on facts strikingly similar to those before us here, we held that the CFA did not apply and "plaintiffs' [*460] claims based on the Products Liability Act . . . were properly dismissed under the economic loss doctrine because the only claimed damage was to the house, of which the siding was a component." *Id.* at 290-91, 964 A.2d 330

We briefly describe the facts in *Marrone*. In 1995, the DeCilveos contracted to build a new home. The home included stucco siding--EIFS--manufactured and distributed by Sto. In 2003, the Marrones purchased the home from the DeCilveos who had experienced no problem with the siding. As here, the DeCilveos had no contact with Sto, received no warranties and did not rely on any representations regarding the siding. After the Marrones purchased [***11] the home, they received a letter from their homeowners insurance company threatening to cancel their coverage because of the siding. Additionally, they discovered that the EIFS siding was defective. Thus, the Marrones brought a cause of action against various defendants, including Sto. The same expert who presented a report on plaintiffs' behalf here, also presented a report in *Marrone*. As we noted:

> A September 2005 expert report provided to plaintiffs by R.V. Buric

> indicated that the construction contractor had improperly installed the EIFS cladding. However, Buric also opined that the EIFS system was poorly designed because it depended on the applied cladding being perfectly water-tight and had no back-up system to carry moisture away from the exterior walls if water penetrated behind the cladding. Buric found damage to the EIFS cladding itself, as well as water damage to sheathing and wood framing and to some windows.
>
> [*Id.* at 292, 964 A.2d 330.]

I.

We first address the claim under the CFA. In *Marrone*, we rejected the plaintiffs' claim for relief under the CFA. Holding that our decision in *Chattin v. Cape May Greene, Inc.*, 216 N.J. Super. 618, 524 A.2d 841 (App.Div.), *certif. denied*, 107 N.J. 148, 526 A.2d 209 (1987), was dispositive, [***12] we rejected plaintiff's reliance on *Perth Amboy Iron Works, Inc. v. American Home Assurance Co.*, 226 N.J. Super. 200, 543 A.2d 1020 (App.Div.1988), *aff'd o.b.*, 118 N.J. 249, 571 A.2d 294 (1990), concluding that the case involved representations that were made or intended to be [*461] made to the buyer. *Marrone, supra*, 405 N.J. Super. at 295, 964 A.2d 330. We noted,

> [I]n this case, the evidence indicated that Sto actively marketed its EIFS cladding to builders and architects and other construction professionals. Unlike *Perth Amboy*[,] . . . however, there is no evidence that Sto's representations were conveyed to the DeCilveos or to plaintiffs or that they were even aware that [**197] the EIFS cladding was part of the house.
>
> [*Ibid.*]

Finally, on the issue of Sto creating a misrepresentation by omission rather than an affirmative statement, we concluded that there was no proof that Sto intentionally concealed any information "'with the intention that plaintiff[s] would rely on the concealment, and that the information was material to the transaction.'" *Marrone, supra*, 405 N.J. Super. at 297-98, 964 A.2d 330 (quoting *Judge v. Blackfin Yacht Corp.*, 357 N.J. Super. 418, 426, 815 A.2d 537 (App.Div.), *certif. denied*, 176 N.J. 428, 824 A.2d 157 (2003)).

A similar result was reached in *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517, 805 N.E.2d 213, 281 Ill. Dec. 845 (2004), [***13] where several homeowners brought consumer fraud claims against the manufacturer of composite wood siding that had been used on their homes. The plaintiffs alleged that the defendant had deceptively advertised its product and fraudulently failed to disclose that its product performed poorly in the field. None of the plaintiffs had received any representations regarding the siding from the defendant. Five of the plaintiffs were subsequent purchasers of the house, while two of the plaintiffs were original owners who had reviewed brochures from the builder containing the builder's representations regarding the siding. There was no claim that any particular builder, architect, or engineer had received any product literature from the defendant or that any plaintiff, in deciding whether to purchase their home, had communicated with anyone who had received literature from the defendant.

In holding that the consumer fraud claims could not be sustained, the Illinois Supreme Court held that deceptive advertising could not be the basis for a claim under the Illinois statute "unless [*462] it actually deceives the plaintiff." *Id.* at 217. The Court found that the crux of the plaintiffs' claim was that the [***14] defendant's "alleged deceptions created a market for their product that would not otherwise exist, thus resulting in its use on their homes and the plaintiffs' ultimate damages." *Ibid.* Although recognizing that it was possible that the siding might not have been installed on the plaintiffs' homes but for the defendant's promotional literature, the Court held:

> It does not follow, however, that the literature distributed to unnamed persons 20 or more years ago, who may or may not have been deceived, induced plaintiffs to accept the siding. Without such a nexus, the alleged deception is simply too remote from the claimed damages to satisfy the element of proximate cause.
>
> [*Id.* at 218.]

The rule in *Shannon* applies with equal force to plaintiffs here.

We adopt the reasoning in *Marrone* and conclude that the motion judge properly dismissed the CFA cause of action. As in *Marrone*plaintiffs here neither received nor relied on any misrepresentation by Sto. The statute requires, among other things, misrepresentation or

omission of material fact with intention of reliance, N.J.S.A. 56:8-2, and none of those elements are present here. There is no nexus between plaintiffs' purchase of the house and [***15] Sto's conduct or lack thereof.

II.

We reach a similar result in regard to the claim under the PLA. Plaintiffs claim that the judge erred in dismissing their tort-based claims because it: failed to recognize that a house is unique and is not subject to the provisions of the Uniform [**198] Commercial Code (UCC); failed to recognize that plaintiffs had no privity with defendant; mistakenly believed that plaintiffs had to show damage to their house of a certain magnitude in order to be able to recover under the PLA; misconstrued the case law regarding application of the economic loss doctrine; and failed to understand plaintiffs' inability to avoid the risk posed to them by defendant's product. In *Marrone*, we concluded that the PLA did not apply under the facts presented on that appeal. *Marrone, supra*, 405 N.J. Super. at 297-304, 964 A.2d 330

[*463] The law in New Jersey has evolved in the area of strict liability. For many years, the New Jersey rule, first espoused in *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), was that the purchaser of a product could recover in strict liability or negligence from the manufacturer or seller for damage to the product itself. This minority view was directly contrary to the [***16] one taken by the majority of courts, which followed the holding of the California Supreme Court, pronounced in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), that the law of warranty precluded imposing tort liability if a defective product caused monetary harm only. Subsequently, the United States Supreme Court adopted an approach similar to *Seely* and held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself." *East River S.S. Corp. v. Transam. Delaval*, 476 U.S. 858, 871, 106 S. Ct. 2295, 2302, 90 L. Ed. 2d 865, 877 (1986).

The Court noted that the losses sustained by a commercial user when the product injures itself are ones that can be insured against, that the increased cost to the public that would result from allowing the manufacturer to be sued in tort for injury to the product itself is not justified, and that damage to a product itself is most naturally understood as a warranty claim. *Id.* at 871-72, 106 S. Ct. at 2302, 90 L. Ed. 2d at 877. "Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer [***17] has received 'insufficient product value.' . . . The maintenance of product value and quality is precisely the purpose of express and implied warranties." *Id.* at 872, 106 S. Ct. at 2302-03, 90 L. Ed. 2d at 877-78 (citation and footnote omitted). The Court also noted that commercial situations generally do not involve large disparities in bargaining power and that the parties could allocate their own risks. *Id.* at 872-73, 106 S. Ct. at 2303, 90 L. Ed. 2d at 878.

Essentially, this was the same position taken by our own Supreme Court one year earlier, in *Spring Motors Distributors, [*464] Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985). That is, the Court noted that the UCC was "the more appropriate vehicle for resolving commercial disputes arising out of business transactions between persons in a distributive chain," *id.* at 571, 489 A.2d 660, and that the considerations that gave rise to strict liability did not apply between commercial parties with comparable bargaining power. *Id.* at 576, 489 A.2d 660. It held that, with respect to commercial buyers, strict liability was not "an appropriate basis of a claim for economic loss." *Id.* at 577-78, 489 A.2d 660. Rather, the UCC was "'generally regarded as the *exclusive* source for ascertaining [***18] when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing *other than the defective product itself*.'" *Id.* at 581, 489 A.2d 660 (quoting W. Prosser & W. Page Keeton, *Handbook of the Law of Torts* § 95A at 680 (5th ed. 1984)) (emphasis added).

[**199] Thereafter, in *Alloway v. General Marine Industries, L.P.*, 149 N.J. 620, 626, 695 A.2d 264 (1997), the issue was whether the purchaser of a defective boat could sue in tort to recover the cost of repairs to the boat and lost trade-in value. No other property of the plaintiff was alleged to be damaged. *Id.* at 626-27, 695 A.2d 264

The Court noted that tort principles were better suited to resolve personal injury claims or claims for damage to "other property," while contract principles were better suited to claims for "economic loss caused by damage to the product itself." *Id.* at 627, 695 A.2d 264. "[E]conomic loss encompasses actions for the recovery of damages for costs of repair, replacement of defective goods, inadequate value, and consequential loss of profits." *Ibid.* Citing both *East River* and *Spring Motors, Alloway* held that factors relevant to the distinction between the two theories [***19] of recovery included the relative bargaining power of the parties and the "allocation of the loss to the better risk-bearer in a modern marketing system." *Id.* at 628, 695 A.2d 264 (internal quotations and citations omitted).

[*465] In *Alloway*, the plaintiff had purchased a luxury item and was not at any disadvantage when bargaining for its purchase. Moreover, he had protected himself against the risk of loss through the purchase of an insurance policy. *Id.* at 629, 695 A.2d 264. The Court

found that the vast majority of courts across the country had concluded that "purchasers of personal property, whether commercial entities or consumers, should be limited to recovery under contract principles." *Id.* at 633, 695 A.2d 264. The Court also noted that the then-proposed *Restatement (3d) of Torts: Products Liability* § 21 defined economic loss to exclude recovery in tort for damage to the product itself. *Id.* at 636, 695 A.2d 264. [3]

> 3 According to *Restatement (3d) of Torts: Products Liability* § 21 (1998), economic loss includes harm to: "(a) the plaintiff's person; or (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or (c) the plaintiff's property other than the defective product itself."
>
> Similarly, [***20] *N.J.S.A.* 2A:58C-1(b)(2) defines harm as:
>
> > (a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.

Significant here, *Alloway* declined to resolve the issue of which law should apply when the defective product poses a serious risk to other property or persons. *Id.* at 638, 695 A.2d 264. Also, the Court did not reach the issue of preclusion of a strict liability claim "when the parties are of unequal bargaining power, the product is a necessity, no alternative source for the product is readily available, and the purchaser cannot reasonably insure against consequential damages." *Id.* at 639, 695 A.2d 264. The Court noted that, in addition to recovery under the UCC, a purchaser might possess rights under common law fraud, the CFA, or various other state or federal statutes designed to protect consumers. *Id.* at 639-40, 695 A.2d 264. The Court specifically noted that the PLA was not intended to codify all common law remedies, so that the exclusion in that statute of harm to [***21] the product itself, [*466] *see* footnote 3, *supra*, was not dispositive. *Id.* at 640, 695 A.2d 264

Plaintiffs here argue that their case is governed by the questions left unanswered by *Alloway*. That is, they claim that they did sustain damage to "other property," [**200] that they did not possess equal bargaining power with defendant, and that their home was a necessity. They also argue that their case is governed by our decision in *DiIorio v. Structural Stone & Brick Co., Inc.*, 368 N.J. Super. 134, 845 A.2d 658 (App.Div.2004). We disagree.

In *DiIorio*, the plaintiff had contracted with a builder for the construction of a home. Although the plaintiff did not have a separate agreement with the builder's stone supplier, he did meet with the supplier, who represented that his stones were of high quality and suitable for exterior use. *Id.* at 137-38, 845 A.2d 658

After closing, the stones began to flake and permitted moisture to infiltrate, causing staining, flaking, and shearing of the interior and exterior stone. Ultimately, the stone had to be removed and replaced, which resulted in damage to other portions of the house, to the deck, and to landscaping. *Id.* at 138, 845 A.2d 658

The defendant's motion to dismiss the claim as time-barred under the UCC was denied, [***22] and the defendant appealed. As we observed, the question presented was whether the plaintiff's claim was limited to the UCC or whether he could pursue claims based in tort. *Id.* at 140, 845 A.2d 658. We noted that *Alloway* had extended *Spring Motors*' holding to "transactions in goods involving non-commercial buyers." *Id.* at 140, 845 A.2d 658. However, common law and statutory claims were still available to consumers "if goods cause damage to other property." *Ibid.* (footnote omitted). We found that the plaintiff in *DiIorio* had alleged damage to other property, specifically damage to other portions of his house, to his deck, and to his landscaping, and that his loss was thus not limited to the value of the stones themselves. *Id.* at 141, 845 A.2d 658. Hence, his recovery was not limited to the UCC. *Ibid.*

We also noted that the UCC would not govern the plaintiff's claim since it did not apply to transactions in real property. *Ibid.* [*467] Moreover, the transaction could be viewed as one for the rendition of services, *i.e.*, the construction of a home, which incidentally included the provision of certain goods. *Ibid.* In such a mixed transaction, that is, a hybrid of sales and service, a court had to ascertain the primary purpose of the transaction. [***23] *Id.* at 141-42, 845 A.2d 658. We found that the plaintiff had

> entered into a transaction with a builder and although he was introduced to the builder's supplier of stone, the predominant aspect of his transaction was with the builder. The price paid by plaintiff to the builder included the value of the stone and labor costs associated with its installation onto the facade of the home. To the extent the transaction may

> be rightly characterized as a transaction in goods, that aspect was, at most, incidental. Under such circumstances, the four year statute of limitations of the U.C.C. does not bar plaintiff's cause of action.
>
> [*Id.* at 142, 845 A.2d 658.]

As we observed in *Marrone*, our decision in *DiIorio* focused on the nature of the transaction, and we carefully crafted our language to characterize this as "primarily one for the professional services of a builder." *Marrone, supra*, 405 N.J. Super. at 303, 964 A.2d 330. The discussion in *DiIorio* regarding the economic loss doctrine was dicta since we held that plaintiff's claim was not barred by the four year statute of limitations under the U.C.C., due to the nature of the transaction, which was one for professional services rather than the sale of goods.

*DiIorio*neither was compelled [***24] to nor did it reach or address the critical issue here, that is whether "when a component part of a product or a system injures the rest of the product or the system, only [**201] economic loss has occurred." *Wilson v. Dryvit Sys.*, 206 F. Supp. 2d 749, 753 (E.D.N.C.2002), *aff'd*, 71 Fed. Appx. 960 (4th Cir.2003). This issue was addressed and decided, adverse to plaintiffs' position, in *Marrone*

The critical issue here has arisen in the context of a building defect, specifically in the context of a defect in exterior siding, such as EIFS or a similar product, causing damage to other parts of the structure. [4] In *Wilson*, for example, the federal district [*468] court held that the defendant's exterior cladding product was an integral component of the plaintiff's house. 206 F. Supp. 2d at 754. The damage it caused to the plaintiffs' sheathing, framing, doors, windows, and sub flooring, by virtue of its allowing moisture intrusion behind the faces of the house, was damage to the house itself and did not constitute "other property" damage so as to allow the plaintiffs to avoid the economic loss rule and sue in tort. *Id.* at 753-54.

> 4 For collected cases, see J.M. Zitter, Annotation, *Strict Products Liability: Recovery for Damage to Product Alone*, 72 A.L.R.4th 12 (1989).

This [***25] same result has been reached in other jurisdictions. *See, e.g., Wash. Courte Condo. Ass'n-Four v. Wash.-Golf Corp.*, 150 Ill. App. 3d 681, 501 N.E.2d 1290, 1293-94, 103 Ill. Dec. 752 (1986) (holding that damage to insulation, walls, ceilings, floors, and electrical outlets that was caused by defendant's negligence in installing windows and doors that allowed water and air to intrude into plaintiffs' units, was not damage to "other property" and was economic loss only); *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259, 1267-69 (2000) (applying economic loss doctrine to negligence claim against subcontractor based on damage to flooring and ceilings and structural and wood decay, caused by water intrusion from defective framing of house); [5] *Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095, 802 N.Y.S.2d 174, 175-76 (2005) (dismissing plaintiffs' tort claims for damage to EIFS siding and to plywood substrate attached to their home due to water infiltration, since such claims were for "economic loss" only due to product failure); *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 92-94 (Tex.Ct.App.2007) (noting that economic loss doctrine precludes tort claims against supplier of defective component part that causes damage [***26] to finished product into which component is incorporated; this doctrine applies to claim against use of EIFS in residential or commercial construction), *review denied*, 2008 Tex. LEXIS 607 (Tex.2008); *Bay Breeze Condo. Ass'n, Inc. v. Norco Windows, Inc.*, 2002 WI App 205, 257 Wis. 2d 511, 651 N.W.2d 738, 743-46 (Ct.App.2002) (holding that damage by defective component of integrated [*469] system to system as a whole or to other components is not "other property" damage which precludes economic loss doctrine; applying this holding to building construction defects, such as defect to windows).

> 5 The holding in *Calloway*was subsequently superseded by statute. *Olson v. Richard*, 120 Nev. 240, 89 P.3d 31, 33 (2004).

Other courts have reached the same result as to what constitutes "other property" by looking to the product purchased by the plaintiff, as opposed to the product sold by the defendant. *See, e.g.*, *Easling v. Glen-Gery Corp.*, 804 F. Supp. 585, 590 (D.N.J. 1992) (observing that where plaintiffs purchased completed apartment complex, not "a load of bricks," they could not pursue tort relief for damage caused by defective bricks to surrounding mortar or to other parts of building); *Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, Inc.*, 659 A.2d 267, 271 (Me. [**202] 1995) [***27] (holding that where plaintiffs purchased finished condominium units, not individual components of those units, any damages caused by defective windows constituted damage only to product itself, and precluded suit in tort); *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla.1993) (concluding that where homeowners purchased finished dwellings, not individual items of building materials, such as concrete, any damage caused to home by defective concrete was not recoverable in negligence action). Notably, the *Casa Clara* court

refused to carve out an exception to the economic loss doctrine for homeowners, even though it recognized that buying a house was the largest investment that many consumers ever make. *Casa Clara*, 620 So. 2d at 1247.

A minority of jurisdictions have held to the contrary. For example, in *Stearman v. Centex Homes*, 78 Cal. App. 4th 611, 622-23, 92 Cal. Rptr. 2d 761 (2000), the California appellate court held that losses due to a defective foundation that caused slab movement and cracks throughout the exterior and interior surfaces of a home were recoverable in strict liability as "physical damage to property." Similarly, in *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 155-56 (Ind.2005), [***28] the Indiana Supreme Court held that the product sold to the plaintiffs was not the entire house on which a [*470] stone facade was installed, and the plaintiffs could seek a tort recovery for damage to the walls, ceilings, floors, drywall, and carpet caused by moisture problems from the defective facade. In *Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating*, 94 P.3d 1177, 1181 (Colo.Ct.App.2003), the Colorado appellate court held that a negligence suit against a subcontractor for construction defects was not barred by the economic loss doctrine because subcontractors owed homeowners a duty of care, independent of any contract provision, in connection with construction of a home.

We conclude that the sounder view is expressed by us most recently in *Marrone*and the majority of jurisdictions that have addressed the critical issue. Here, plaintiffs purchased a house, not exterior siding, and the exterior siding was an integrated component of the finished product of that house.

Two critical issues become determinative. As both the United States Supreme Court in *East River* our Supreme Court in *Alloway*as well as our decisions in *Goldson v. Carver Boat Corp.*, 309 N.J. Super. 384, 396-98, 707 A.2d 193 (App.Div.1998), [***29] and most recently, *Marrone* the policy supporting the economic loss rule requires consideration of the relative bargaining power of the parties as well as the ability of the parties to protect against the risk involved.

The economic loss rule "defines the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort, particularly in strict liability and negligence cases." R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 *Wm. & Mary L. Rev.* 1789, 1789 (2000). The purpose of the rule is to "strike an equitable balance between countervailing public policies," that exist in tort and contracts law. Gennady A. Gorel, Note, *The Economic Loss Doctrine: Arguing for the Intermediate Rule and Taming the Tort-eating Monster,* 37 *Rutgers L. J.* 517, 524 (2006).

[*471] "Tort law, specifically product liability law, is based on a public policy concern that consumers need more protection from dangerous products than is afforded by the law of warranty." Gorel, *supra*, 37 *Rutgers* [**203] *L. J.* at 525 (quotations omitted). Therefore, "a manufacturer may be in a better [***30] position to absorb the risk of loss from physical injury or property damage[.]" *Alloway, supra*, 149 N.J. at 628, 695 A.2d 264. Also, by holding manufacturers liable for loss from physical injury or property damage, "courts create a greater incentive for manufacturers to make safer products." Gorel, *supra*, 37 *Rutgers L. J.* at 526. On the other hand, the policy behind contract law "operates on the premise that contracting parties, in the course of bargaining for terms of a sale, are able to allocate risks and costs of the potential nonperformance. The underlying assumption is that the contract is the result of an arms-length negotiated transaction." Barton, *supra*, 41 *Wm. & Mary L. Rev.* at 1796. In that case, "a purchaser may be better situated to absorb the 'risk of economic loss caused by the purchase of a defective product.'" *Alloway, supra*, 149 N.J. at 628, 695 A.2d 264, (quoting *Spring Motors, supra*, 98 N.J. at 576, 489 A.2d 660). *See also East River, supra*, 476 U.S. at 872-73, 106 S. Ct. at 2303, 90 L. Ed. 2d at 878, (noting that "[c]ontract [***31] law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements" and insure themselves against the risk of loss). Therefore, "[t]he increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified." *East River, supra*, 476 U.S. at 872, 106 S. Ct. at 2303, 90 L. Ed. 2d at 877. Furthermore, "[b]y refusing to extricate parties from the bargains that they have struck, the economic loss rule encourages parties to consider the possibility that the product will not perform properly and either assign risk or negotiate the price accordingly." Barton, *supra*, 41 *Wm. & Mary L. Rev.* at 1798.

Finally, allowing recovery for economic losses in a tort action would subject the manufacturer to unending liability. *East River, supra*, 476 U.S. at 874, 106 S. Ct. 2295 (noting that "[a] warranty [*472] action also has a built-in limitation on liability, whereas a tort action could subject the manufacturer to damages of an indefinite amount"). *See also Alloway, supra*, 149 N.J. at 633, 695 A.2d 264 (noting that "[a]llowing recovery for all foreseeable damages [***32] in claims seeking purely economic loss, could subject a manufacturer to liability for vast sums arising from the expectations of parties downstream in the chain of distribution"). "Such

unending liability would decrease certainty and predictability in allocating risk, and thereby impede future business activity and contract negotiation." Barton, *supra*, 41 *Wm. & Mary L. Rev.* 1800.

Application of the policy supporting the economic loss rule supports barring the claim before us. As between plaintiffs as buyers and the Messinas as sellers, we discern no difference in bargaining power. As the subsequent purchasers of a home, plaintiffs had the opportunity to negotiate a contract, obtain a home inspection and to negotiate a final price with the sellers. In fact, their home inspection report notified them that they were purchasing a home that was clad in EIFS and that there could be problems with this product. At that point, plaintiffs could have done more research about the product. They were also free to walk away from the transaction or to insist that the sellers remediate the defect. We make no findings as to the merits of the factual issues in dispute between the parties but recognize [***33] that the parties had the distinct opportunity to fully protect their respective interests.

We recognize the thoughtful and well-articulated concerns expressed by our concurring [**204] colleagues regarding the application of the economic loss rule as a bar to innocent purchasers recovering under the PLA from a manufacturer of a defective component of the home, where that component causes physical damage to other portions of the home; however, that is not the case we have before us on this appeal. As our concurring colleagues observe, plaintiffs, here, had appropriate opportunities to protect themselves from the potential of loss caused by the defective component. We [*473] would leave for another day and different factual scenario the critical issues raised in the concurring opinion.

Finally, we reject plaintiffs' argument that our recent decision in *Boyle v. Ford Motor Co.*, 399 N.J. Super. 18, 942 A.2d 850 (App.Div.2008), mandates a different result. *Boyle* involved an accident in which the plaintiff was seriously injured when his car collided with a truck. The issue before us was whether the legal responsibility to install a safety device on the truck fell upon the manufacturer of a component product or the final-state [***34] manufacturer, and the economic loss doctrine was not an issue in the case.

Affirmed.

CONCUR BY: SABATINO, J.A.D.

CONCUR

SABATINO, J.A.D., concurring in the judgment.

I fully endorse Judge Carchman's cogent analysis sustaining the dismissal of plaintiffs' claims against Sto under the Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -184 ("CFA"). I also concur with the dismissal of the product liability claims in this particular case because of plaintiffs' knowing disregard of the potential risks of the EIFS sheathing in the premises before they took title to the house.

Nonetheless, I write separately to express concerns about the scope and application of the "economic loss" doctrine in circumstances involving a homeowner who, unlike the instant plaintiffs, is unaware of the latent risks of a defective component product that was used in the construction of his or her home. In my view, such an innocent home purchaser should be able to recover, under the Product Liability Act, *N.J.S.A.* 2A:58C-1 to -11 ("PLA"), reasonable compensation from the manufacturer of that defective component for the physical harm the component caused to other portions of the home and to any other property owned by the plaintiff.

More specifically, in such [***35] a products liability action against the component manufacturer, I do not consider the physical damage to other portions of the home as comprising injury to "the product itself" that is non-recoverable under the PLA and under the [*474] "economic loss" doctrine. Moreover, I do not read the prior opinions of our Supreme Court as foreclosing such potential strict liability of a component manufacturer to an innocent home purchaser.

Judge Carchman's scholarly opinion does an outstanding job in tracing the history of the economic loss doctrine and the distinctive policy considerations that underlie, on the one hand, contract law principles such as those codified in the Uniform Commercial Code ("U.C.C.") and, on the other hand, tort law principles of strict liability such as those embodied in the PLA. I recognize that in certain defined settings, such as a lawsuit by a commercial purchaser who has purchased a defective item, or an action by the buyer of chattel against the seller of those goods, our Supreme Court (as well as the courts in many--but not all--other jurisdictions) holds that such plaintiffs are confined to their contractual and other non-tort remedies in pursuing damages, unless [***36] bodily injury is involved. I do not question those settled legal principles here.

[**205] The present context, however, is one that has not yet been addressed by our Supreme Court. The context is one where: (1) the plaintiffs are the non-commercial purchasers of a home, not a good or chattel; (2) the products claim at issue is one asserted against the manufacturer of a component item installed in the home prior to plaintiffs' acquisition of the realty; and (3)

plaintiffs seek compensation, beyond the repair and replacement of the defective component itself, for the physical damage caused to other portions of the structure that were neither made nor supplied by the defendant. The Court has yet to pronounce whether the economic loss doctrine shields a manufacturer of such a faulty component of a house from liability to an innocent consumer for the foreseeable physical damage to other portions of the house or to surrounding landscaping and property.

To be sure, in *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 561, 489 A.2d 660 (1985), the Court endorsed the economic loss doctrine in a context where a commercial buyer of [*475] fourteen trucks containing defective transmissions sought recovery for [***37] "repair, towing and replacement parts, as well as for lost profits and a decrease in the value of such trucks." The buyer sued the manufacturer of the trucks (Ford), the Ford dealership, and the company that had supplied the component transmissions (Clark). In the course of addressing that business setting, one in which the buyer had specifically negotiated to have the trucks fitted by Ford with the Clark transmissions, the Court observed that "the U.C.C. is the more appropriate vehicle for resolving *commercial disputes* arising out of *business* transactions between persons in a distributive chain." *Id.* at 571, 489 A.2d 660 (emphasis added).

The Court reasoned in *Spring Motors* that the economic loss doctrine should preclude consequential tort damages in such a business setting, in which the buyer and seller have an arms-length reciprocal opportunity to negotiate over warranties and other liability-allocation terms at the point of sale. Consequently, the Court held that "a *commercial buyer* seeking damages for economic loss only should proceed under the U.C.C. against parties in the chain of distribution." *Id.* at 578, 489 A.2d 660 (emphasis added). Hence, the Court reversed an order that permitted Spring Motors, as [***38] such a commercial plaintiff, to maintain an action in strict liability for economic loss. *Id.* at 579, 489 A.2d 660

Although Spring Motors' warranty claims against the component manufacturer, Clark, were untimely under the U.C.C. statute of limitations, the Court nevertheless was persuaded that "the better rule [of law] is to restrict parties that are part of a single distributive chain to the U.C.C. in a suit for economic loss *arising out of a commercial transaction*." *Id.* at 582, 489 A.2d 660 (emphasis added). In his concurring opinion in *Spring Motors*, Justice Handler stressed the commercial nature of the transaction, the comparable bargaining power of the parties, and the buyer's sophistication in demanding that the truck manufacturer install the particular brand of transmission. *Id.* at 589-97, 489 A.2d 660

[*476] The Justices in *Spring Motors* were particularly influenced by the California Supreme Court's opinion in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), a case described in *Spring Motors*, 98 N.J. at 571-74, 489 A.2d 660, as representing the "majority view" of courts in other jurisdictions. In *Seely, supra*, the plaintiff bought from a dealer a truck, which he used in his hauling business. 45 Cal. Rptr. 17, 403 P.2d at 147. [**206] One day the truck malfunctioned [***39] while rounding a corner, allegedly because of the engine "galloping" at the same time that the brakes failed, and the truck overturned. The plaintiff sued the dealer and manufacturer of the truck for economic damages, consisting of the lost profits of his business and the purchase price of the truck itself.

The California Supreme Court held that the plaintiff, despite his lack of privity with the truck manufacturer, could pursue contract-based damages against that manufacturer under the U.C.C. *Id.* at 148-49. However, the court rejected the buyer's alternative tort-based claims of strict liability because there were no bodily injuries involved and no property damage shown to be caused by the defendants' conduct. *Id.* at 152. Significantly, Chief Justice Traynor's majority opinion in *Seely* concludes with the following:

> *Plaintiff contends* that, even though the law of warranty governs the economic relations between the parties, *the doctrine of strict liability in tort should be extended to govern physical injury to plaintiff's property, as well as personal injury. We agree with this contention. Physical injury to property is so akin to personal injury that there is no reason to distinguish* [***40] *them*. (*See* Prosser, *supra*, 69 Yale L.J. 1099, 1143; Rest. 2d Torts (Tent. Draft No. 10), § 402 A); *cf. Greenman v. Yuba Power Products, Inc.*, [59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (Cal. 1963)]. *In this case, however, the trial court found that there was no proof that the defect caused the physical damage to the truck*. The finding of *no causation*, although ambiguous, was sufficient absent a request by plaintiff for a specific finding. (See Code Civ. Proc., § 634.) Since the testimony on causation was in conflict, the trial court's resolution of the conflict is controlling.
>
> [*Ibid.* (emphasis added).]

Our own Supreme Court in *Spring Motors, supra*, recognized this causation deficiency in *Seely*. 98 N.J. at 572, 489 A.2d 660 ("[a]lthough the truck had been damaged, the court sustained a finding of the trial court that defendant[s] had not created the [*477] defect that caused the damage"). Thus, *Seely*which was cited with approval in *Spring Motors*, did not foreclose a plaintiff from bringing a strict liability claim against a product manufacturer for "property damage," at least where causation is established.

Twelve years after *Spring Motors*, our Supreme Court decided *Alloway v. General Marine Industries, L.P.*, 149 N.J. 620, 626, 695 A.2d 264 (1997), [***41] and extended the economic loss doctrine to a certain non-commercial transaction, namely, the purchase of a luxury power boat by a recreational boater. Three months after the sale, the boat sank in the marina, allegedly because of a defective seam in its interior swimming platform. The vessel's sinking did not cause anyone to sustain bodily injuries. The buyer, and his insurer, sued the company that had sold him the boat, Mullica, and also GMI, the corporate successor of the boat manufacturer. The plaintiffs did not sue the manufacturer of any component part within the boat. The plaintiffs' complaint rested upon three theories: (1) breach of contractual warranty, (2) strict products liability, and (3) negligence. *Id.* at 624, 695 A.2d 264. As a remedy, the plaintiffs sought the expenses the buyer incurred in repairing the boat, the difference between the boat's sale price and its market value in defective condition, attorneys fees, and costs. *Ibid.*

The Court concluded in *Alloway* that plaintiffs could not rely on theories of strict liability and negligence to recover "damages for economic loss resulting from a defect that caused injury only to the boat [**207] itself." *Id.* at 626, 695 A.2d 264. In this regard, the Court [***42] defined "economic loss" to encompass "damages for costs of repair, replacement of defective goods, inadequate value, and consequential loss of profits." *Id.* at 627, 695 A.2d 264. Economic losses also include the diminution in the value of the product because of its inferiority and failure to meet the general purposes for which it was sold. *Ibid.* The Court found significant that plaintiffs "did not allege that other property was damaged or that anyone sustained personal injuries." *Id.* at 626-27, 695 A.2d 264

[*478] Given the factual and procedural context in *Alloway* and the nature of the damages claimed, the Court ruled that, absent fraud, the buyer's appropriate recourse lied in contract-based remedies under the U.C.C. *Id.* at 638-43, 695 A.2d 264. The Court observed that "[g]enerally speaking, tort principles are better suited to resolve claims for personal injuries or damages to other property." *Id.* at 626-27, 695 A.2d 264. In making that observation, the Court cited, among other things, the California Supreme Court's opinion in *Seely*, as well as the United States Supreme Court's decision in *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 871, 106 S. Ct. 2295, 2302, 90 L. Ed. 2d 865, 877 (1986).

East River held, as a matter of federal [***43] admiralty law, that the commercial purchasers of oil supertankers could not invoke tort theories of strict liability to recover economic losses from the maker of defective turbines installed in the tankers. The claimed losses in question were the costs of repairing the turbines and the income that the purchasers lost when those turbines failed. 476 U.S. at 859, 106 S. Ct. at 2296, 90 L. Ed. 2d at 869.

Applying the economic loss doctrine in this plainly commercial setting, the United States Supreme Court noted in *East River* that there was no damage to "other property" involved. Rather, each turbine was supplied by the turbine manufacturer "as an integrated unit" and the defectively designed components damaged "only the turbine itself." 476 U.S. at 867, 106 S. Ct. at 2300, 90 L. Ed. 2d at 874. The Court perceived no need under admiralty law to allow plaintiffs to pursue tort-based damages from the manufacturer where the product in question, i.e., each turbine sold by defendant, had "injured itself." In doing so, the Court explicitly recognized the commercial nature of the relationships before it:

> The tort concern with safety is reduced when an injury is only to the product itself. When [***44] a person is injured, the "cost of an injury and the loss of time or health may be an overwhelming misfortune," and one the person is not prepared to meet. *Escola v. Coca Cola Bottling Co.*, [24 Cal. 2d 453, 150 P. 2d 436, 441 (Cal. 1944)] (opinion concurring in judgment). In contrast, when a product injures itself, *the commercial user* stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, [*479] experiences increased costs in performing a service. Losses like these can be insured . . . Society need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified.

Cf. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 ([2d.] Cir.1947).

[*East River, supra*, 476 U.S. at 871-72, 106 S. Ct. at 2302, 90 L. Ed. 2d at 877 (emphasis added).]

The Supreme Court went on to add:

> We recognize, of course, that warranty and products liability are not static [**208] bodies of law and may overlap. In certain situations, for example, the privity requirement of warranty has been discarded. *E.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 380-384, 161 A.2d 69[, 81-84] (1960) [***45] . In other circumstances, a manufacturer may be able to disclaim strict tort liability. *See, e.g.*, *Keystone Aeronautics Corp. v. R. J. Enstrom Corp.*, 499 F.2d 146, 149 ([3d.] Cir.1974). Nonetheless, *the main currents of tort law run in different directions from those of contract and warranty, and the latter seem to us far more appropriate for commercial disputes of the kind involved here*.
>
> [*East River, supra*, 476 U.S. at 873 n. 8, 106 S. Ct. at 2302, 90 L. Ed. 2d at 878 (emphasis added).]

The present case is unlike the circumstances in *Spring Motors*, *Alloway*and *East River* It is distinguishable from *Spring Motors* and *East River*because the Deans are not commercial purchasers, but rather individuals who bought a home for their personal use. They purchased real estate, not a chattel. Their ability to bargain with manufacturers is not comparable to that of the trucking company in *Spring Motors*which insisted on the brand of component transmissions to be used in its fleet of trucks, or the shipping firms that contracted for the multi-million-dollar supertankers in *East River* Their home purchase was simply not an equivalent commercial transaction.

Nor is the present case squarely [***46] on point with *Alloway* Unlike *Alloway*the products liability claim here is not pleaded against the party that made or sold the entire thing that plaintiffs bought, or that party's business successor. Rather, the claim is against the remote manufacturer of a component part, Sto. Moreover, *Alloway* involved the sale of a chattel, whereas the present case concerns the sale of real estate.

The Legislature has defined compensable harm under the PLA to include "physical damage to property, other than the product itself[.]" *N.J.S.A.* 2A:58C-1(b)(2)(a). Judge Carchman construes [*480] the house purchased by the Deans as the only "product" at issue here, and, accordingly, regards any physical harm to the house caused by the EIFS sheathing as damage to the "product itself." A similar approach was adopted by the panel in *Marrone v. Greer & Polman Construction Inc.*, 405 N.J. Super. 288, 964 A.2d 330 (App.Div.2009). However, prior to *Marrone*, no published decision of our courts had ever classified a house as a "product" within the ambit of the PLA. The out-of-state cases relied upon in *Marrone* for that proposition, *see id.* at 300, 964 A.2d 330, did not involve a single-family house, but rather involved dwellings that are frequently [***47] mass-produced such as a trailer [1], a town house [2] and a condominium [3]. Although I confess to uncertainty on the point, I have considerable doubt that the [**209] Legislature intended to treat a single-family house as a "product" when it enacted the PLA. [4]

1 *See* *Waggoner v. Town & Country Mobile Homes*, 1990 OK 139, 808 P.2d 649, 653 (Okla.1990) (rejecting mobile home purchasers' tort actions against manufacturer for costs of repair and lost value resulting from defective roof design, when the damage was to only the mobile home itself, and holding that the claim would be more properly made in a warranty action).

2 *See* *Morris v. Osmose Wood Preserving*, 99 Md. App. 646, 639 A.2d 147 (1994) (rejecting townhome owners' tort claims against plywood manufacturer for gradual deterioration of plywood in roofs because such damage constituted economic loss), *aff'd in part, rev'd in part* 340 Md. 519, 667 A.2d 624 (1995).

3 *See* *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors*, 659 A.2d 267 (Me.1995) (rejecting condominium association's and individual condominium owners' tort claims that sought recovery of economic loss caused by water damage around windows).

4 *See also* *Restatement (Third) of Torts: Products Liability* § 19(1998), cmt. e [***48] (noting that "[t]raditionally, courts have been reluctant to impose products liability on sellers of improved real property in that such property does not constitute goods or personalty," although recently some courts have extended such liability to sellers of prefabricated homes and large housing projects, and concerning built-in equipment attached to the real estate).

On the other hand, the EIFS sheathing is unmistakably a "product." Indeed, "[t]he majority of

courts hold that a defective [*481] product that is incorporated into an improvement to realty does not lose its identity as a product, and that a manufacturer or contractor may be strictly liable for any damages proximately caused by the defect." *Restatement (Third) of Torts: Products Liability, supra*, at §19, Reporter's Note to comment e. [5] I favor that same generally-accepted approach, rather than deeming a component product used in a house as escaping the reach of strict products liability principles. I also should point out that our Supreme Court in *Alloway, supra*, 149 N.J. at 636-39, 695 A.2d 264, relied upon the then-proposed *Third Restatement* in its analysis of the economic-loss doctrine, albeit without discussing the Reporter's [***49] Note to Comment e of Section 19 relating to home construction.

5 *See, e.g., Berman v. Watergate West, Inc.*, 391 A.2d 1351 (D.C. 1978) (air conditioning system); *Pamperin v. Interlake Cos.*, 634 So. 2d 1137 (Fla.Dist.Ct.App.1994) (storage rack system); *Halpryn v. Highland Ins. Co.*, 426 So.2d 1050 (Fla.Dist.Ct.App.1983) (paint on driveway); *Trent v. Brasch Mfg. Co.*, 132 Ill. App. 3d 586, 477 N.E.2d 1312, 87 Ill. Dec. 784 (1985) (heating, ventilating, and air-conditioning system); *O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826 (Minn.1977) (grate of gas floor furnace); *Trustees of Columbia University v. Exposaic Industries, Inc.*, 122 A.D.2d 747, 505 N.Y.S.2d 882 (1986) (concrete panels); *Worrell v. Barnes*, 87 Nev. 204, 484 P.2d 573 (1971) (fitting in waterheater); *Smith v. Fluor Corp.*, 514 So.2d 1227 (Miss.1987) (heat exchanger); *Brokenshire v. Rivas and Rivas, Ltd.*, 142 Ore. App. 555, 922 P.2d 696 (1996) (defendant who installed acrylic floor in bakery was strictly liable for supplying a sale-service "hybrid").

Although the portion of the damages claimed by the Deans for repairing and replacing the defective sheathing itself is not compensable under the PLA, those aspects of the claim relating to physical damage [***50] to other components of the house are not, in my view, so categorically excluded. The economic loss rule has not been extended to those sorts of damages by our Supreme Court to date, at least in the context of a residence, as opposed to a good or a chattel.

In fact, prior to *Marrone*, we held that physical damage to other portions of a house caused by a defective component of a dwelling may subject the manufacturer of that component to strict liability [*482] for that kind of economic harm. We reached that conclusion in *DiIorio v. Structural Stone & Brick Co., Inc.*, 368 N.J. Super. 134, 845 A.2d 658 (App.Div.2004), where defectively-manufactured stones installed in a house had caused physical damage to other portions of the house, to a deck, and to surrounding landscaping. *Id.* at 138, 845 A.2d 658. We noted in *DiIorio* that the plaintiff who purchased the home could not sue for those damages under the UCC because the UCC does not apply to realty transactions. *Id.* at 141, 845 A.2d 658. We found the UCC inapplicable to the transaction, even though the purchaser had some discussions before the home was built with the supplier of the stones. *Id.* at 142, 845 A.2d 658

Judge Carchman points out that we characterized the transaction in *DiIorio* as "primarily [***51] one for the professional services of a builder in which the [defendant manufacturer] [**210] supplied stone incidental to the contract for construction of residential premises." *Id.* at 137, 845 A.2d 658. Even so, we concluded in *DiIorio* that the component stone supplier was potentially liable for the buyer's economic losses under the common law and under statutes other than the UCC. *Id.* at 140-41, 845 A.2d 658. In the course of our analysis, we specifically rejected in *DiIorio* the notion that the PLA's exclusion for "harm to a product itself" foreclosed the plaintiff's claims for damage that the stones had caused to the other portions of the house, to the deck and the landscaping. *Ibid.* ("[t]he economic consequences were therefore not limited to the value of the stones themselves[.]").

By treating, for purposes of the PLA, a manufactured component part of a house as a product that is one and the same with the house itself, *Marrone*and Judge Carchman's opinion in this case divert from *DiIorio* in a troublesome direction. I would instead follow the course of *DiIorio*and what the *Third Restatement* describes as the dominant view of other states, by treating such component parts as discrete products that are subject to potential [***52] strict liability under the common law and products [*483] liability statutes. *Restatement (Third) of Torts: Products Liability, supra*, at § 19, Reporter's Note to comment e.

A manufacturer of a mass produced item such as EIFS sheathing, who places such products into the stream of commerce, is presumptively in the best position to be aware of defects in its wares, and to guard against such defects. I discern no policy justification to adopt a per se rule that, in effect, insulates such component manufacturers from the foreseeable physical damage that their products cause to other portions of a home in which they are installed, particularly where the defect is latent. For example, if a second-floor bathroom pipe bursts because of a defective sealant used in the construction, the injured homeowner should have recourse, under the strict liability principles of the PLA, to recover damages from the sealant manufacturer for the physical harm to the first-floor ceiling, hardwood floors,

and beams that were saturated when the sealant failed and water infiltrated those other portions of the house.

In the present case, however, we are not dealing with such an entirely latent defect, but one that was pointed [***53] out to the Deans, both orally and in writing, by their astute home inspector before they purchased the house. I agree with Judge Carchman that, whatever the proper scope of the economic loss doctrine may be, tort principles should not cover those losses in the particular setting of this transaction. Once alerted to the potential risks of the sheathing, the Deans could have insisted on a warranty from the builder to guard against future consequential harms, or demanded that the sheathing be replaced, or walked away from the purchase altogether. They did none of those things. The defect in the EIFS was no longer, with respect to the Deans, latent. Given this particular transactional context, I have no problem in confining plaintiffs to other remedies that are not based in tort or under the PLA.

With these doctrinal caveats in mind, I concur in the court's disposition affirming summary judgment in favor of Sto.

Judge SIMONELLI joins in this concurring opinion.

LEXSEE

MATTHEW DELIA, Plaintiff, v. A.J. ERICKSON, et al., Defendants

Civil Action No. 85-4774

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1989 U.S. Dist. LEXIS 16558

May 23, 1989, Decided and Filed

NOTICE: [*1] NOT FOR PUBLICATION

COUNSEL: ARTHUR J. MAURELLO, ESQ., Hillsdale, New Jersey, (Attorney for Plaintiff).

HAROLD T. MC GOVERN, ESQ., MC GOVERN & ROSEMAN, Newton, New Jersey, (Attorneys for Defendants).

OPINION BY: WOLIN

OPINION

OPINION

ALFRED M. WOLIN, UNITED STATES DISTRICT JUDGE

Currently before the Court is the motion of defendants A.J. Erickson and Pocono Tree Farms to dismiss as against it certain counts of the Complaint of plaintiff Matthew Delia. For the reasons set forth below, the Court will grant defendants' motion to dismiss Count Four in part and Count Six. Defendants' motion to dismiss is denied as to all other counts.

I. *BACKGROUND*

Plaintiff Matthew Delia executed a contract with defendants A.J. Erickson and Pocono Tree Farms on November 20, 1987 for the purchase of 525 Christmas trees at wholesale for a total price of $ 9,448.75. The contract specified that the trees to be delivered would be of a certain quality and kind.

On December 8, 1987, the Christmas trees were delivered to plaintiff. Plaintiff alleges that the Christmas trees delivered did not conform to the trees defendants contracted to sell plaintiff, and that the defendants refused to cure the alleged defect in delivery. The full contract price for [*2] the Christmas trees was paid by plaintiff. The plaintiff further alleges that he has incurred damages because he was able to resell only a minimal amount of the alleged defective Christmas trees at little or no profit.

Defendants A.J. Erickson and Pocono Tree Farms now moves to dismiss the following claims against them: (1) Plaintiff's claim based on breach of warranties; (2) Plaintiff's claim for relief based upon the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2, *et seq.*; and (3) Plaintiff's civil RICO claim for treble damages and attorney fees pursuant to 18 U.S.C. §§ 1962 and 1964(c).

II. *DISCUSSION*

A. *Consumer Fraud*

Delia's consumer fraud claim is authorized by the Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.* It provides in pertinent part:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such [*3] person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be unlawful practice. . . .
>
> N.J.S.A. 56:8-2.

The essential purpose of the Consumer Fraud Act is the protection of consumers against damages by eliminating fraudulent practices by persons involved in the sale of merchandise. *Fenwick v. Kay American Jeep, Inc.*, 136 N.J. Super. 114, 117, 344 A.2d 785, 787 (A.D. 1975), *rev'd on other grounds,* 72 N.J. 371, 371 A.2d 13 (1977). The Consumer Fraud Act is directed towards consumers who are sold goods and services in the popular sense. *Nevesoski v. Blau,* 141 N.J. Super 365, 378, 358 A.2d 473, 480 (1976). In order to achieve the

intended purpose of the legislature to protect consumers, the Consumer Fraud Act should be construed liberally. *Martin v. American Appliance,* 174 N.J. Super. 382, 384, 416 A.2d 933, 934 (1980); *State v. Hudson Furniture Co.,* 165 N.J. Super. 516, 520, 398 A.2d 900, 902 (1979).

In the case at hand, the issue in contention is whether plaintiff is a consumer within the scope of the Consumer Fraud Act. N.J.S.A. 56:8-1(d) defines the term person as it is used in the act as

any natural [*4] person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof.

Additionally, N.J.S.A. 56:8-19 provides, in part, that a remedy is available to

[a]ny person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim thereof in any court of competent jurisdiction.

Although the term consumer is not defined in the Consumer Fraud Act, a definition of consumer that is used by courts in statutory interpretation is "one who uses (economic) goods and so diminishes or destroys their utilities." *Hundred East Credit Corp. v. Eric Schuster,* 212 N.J. Super. 350, 355, 515 A.2d 246, 248 (1986) (citing Webster's New International Dictionary 2d edition). Because a business entity such as plaintiff satisfies both the definition of a consumer and the requirements necessary to qualify as a person [*5] under the Consumer Fraud Act *id.* at 366, plaintiff qualifies as a consumer under the Consumer Fraud Act and plaintiff's claim under that Act should not be dismissed.

As a consumer under the Consumer Fraud Act, plaintiff is entitled to a mandatory award of treble damages upon an award of a verdict in plaintiff's favor. *Ramanadham v. N.J. Mfrs. Ins. Co.,* 188 N.J. Super. 30, 32, 455 A.2d 1134, 1136 (1982). Therefore, such a mandatory award of treble damages would satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a).

B. *RICO*

Plaintiff's civil RICO claim is authorized by 18 U.S.C. § 1964(c), which provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Plaintiff alleges a violation by defendant of §§ 1962(c) and 1962(d) of the RICO statute. [1] In order to prove a violation of § 1962(c), a plaintiff must show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex* [*6] *Co.,* 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 (1985). Additionally, to prove a violation of § 1962(d), plaintiff must show that defendants conspired "to knowingly further the affairs of the enterprise." *Seville Industrial Machinery v. Southmost Machinery,* 742 F.2d 786, 792 n.8 (3d Cir.), *cert. denied,* 469 U.S. 1211 (1985).

1 18 U.S.C. § 1962(c) and (d) provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Defendant argues that plaintiff has not alleged the existence of the required pattern of racketeering activity needed to satisfy the RICO statute. 18 U.S.C. § 1961(5) provides:

A 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of [*7] which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

Therefore, the initial step in plaintiff's civil RICO claim is to assert that a person, which 18 U.S.C. § 1961(3) defines as any "individual or entity capable of holding a legal or beneficial interest in property," committed two predicate acts within ten years and thus engaged in a pattern of racketeering activity. Plaintiff, in the case at bar, only alleges a single business transaction with defendant. As this does not fulfill the statute's requirement of two acts of racketeering activity, plaintiff's claim based on 18 U.S.C. §§ 1962 and 1964(c) must be dismissed for failure to allege the required pattern of racketeering activity.

C. *Breach of Warranties*

Plaintiff alleges in his fourth cause of action that defendants, in the sale of Christmas trees, breached an express oral warranty of merchantability, an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. Defendant argues that all warranties stated within plaintiff's fourth cause of action were disclaimed by defendant at the time of sale, and therefore [*8] plaintiff's cause of action for breach of warranties should be dismissed.

N.J.S.A. 12A:2-316(1) provides:

[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Chapter on parol or extrinsic evidence (12A:2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Moreover, Comment 1 to U.C.C. 2-316 indicates that subsection one "seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty. . . ." This Court finds that there is a factual dispute as to whether or not an express warranty does indeed exist. If such an express warranty was made and plaintiff could prove reliance on such a warranty, notwithstanding the later disclaimer of warranties, then it cannot be held at this time that plaintiff has not stated a cause of action for breach of express warranty.

The provisions concerning modification and exclusion of implied warranties are found in N.J.S.A. 12A:2-316, [*9] which provides:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'there are no warranties which extend beyond the description of the fact hereof.'

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have been revealed to him; and

(c) an implied warranty can also be excluded or modified by course [*10] of dealing or course of performance or usage of trade.

In order for a disclaimer of implied warranty of merchantability and implied warranty of fitness for a particular purpose to be effective the disclaimer must be conspicuous. *Herbstman v. Eastman Kodak Co.*, 131 N.J. Super. 439, 330 A.2d 384 (A.D. 1974). N.J.S.A. 12A:1-201(10) provides that a disclaimer will be determined to be conspicuous "when it is so written that a reasonable person against whom it is to operate ought to have noticed it." A variety of identifiable factors determine whether an implied warranty disclaimer is conspicuous. "Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color." N.J.S.A. 12A:1-201. In the case at bar, the disclaimer of express and implied warranties is in writing of a larger and contrasting type. Therefore, the requirement of conspicuousness is satisfied.

To disclaim an implied warranty of merchantability the disclaimer must also expressly mention merchantability. *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 332 A.2d 440 (1974). Comment 3 to U.C.C. 2-316 provides that a

[d]isclaimer of the implied warranty of merchantability is permitted [*11] under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

Defendants, in the case at hand, include the term merchantability in its disclaimer. Therefore, defendants have also satisfied the requirements needed to disclaim an implied warranty of merchantability.

A disclaimer for an implied warranty of fitness for a particular purpose is also contained within the defendants' disclaimer of warranties. An implied warranty of fitness for a particular purpose may be excluded by language that is of a general nature, so long as it is in writing and conspicuous. Comment 4 to U.C.C. 2-316. The language used by the defendants specifically states in writing and in a conspicuous manner that an implied warranty of fitness for a particular purpose is being disclaimed. In light of the above, defendants have fulfilled the requirements needed to disclaim such an implied warranty,

The Court finds that defendants have satisfied the requirements needed to dismiss plaintiff's claims for breach of an implied warranty of merchantability and an

implied warranty for fitness for a particular purpose. However, this does not [*12] preclude the plaintiff from asserting claims for breach of contract for nonconformity, breach of express warranty and for misrepresentation.

III. *CONCLUSION*

The motion of defendants' to dismiss the plaintiff's Complaint is granted in part as to Count Four; plaintiff's claims for breach of implied warranties of merchantability and fitness for a particular purpose will be dismissed; however, defendant's motion to dismiss plaintiff's claim for breach of an express warranty will be denied. The Court will also dismiss Count Six of plaintiff's Complaint. In addition, the parties are instructed to submit any outstanding discovery requests to the Magistrate.

An appropriate order is attached.

Dated: May 23, 1989

LEXSEE

ROBIN DOANE and JOEY WALLACE, Plaintiffs-Appellants, vs. GIVAUDAN FLAVORS CORP., et al., Defendants, and CITRUS AND ALLIED ESSENCES, LTD., and POLAROME INTERNATIONAL, INC., Defendants-Appellees.

APPEAL NO. C-080928

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

184 Ohio App. 3d 26; 2009 Ohio 4989; 919 N.E.2d 290; 2009 Ohio App. LEXIS 4268; CCH Prod. Liab. Rep. P18,303

September 25, 2009, Date of Judgment Entry on Appeal

NOTICE:

THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY:

Civil Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. A-0700452.

DISPOSITION: Judgment affirmed.

SYLLABUS

Where employees at a flavoring plant sued the suppliers of diacetyl, a butter-flavoring chemical, alleging that diacetyl had caused them to develop the lung disease bronchiolitis obliterans, the trial court did not err in granting summary judgment in favor of the suppliers on the basis that the employees' complaint had been filed outside the two-year statute of limitations contained in R.C. 2305.10: the discovery rule did not toll the running of the statute of limitations because there was no evidence of wrongful conduct on the part of the suppliers that would have operated to toll the statute.

The trial court did not err in granting summary judgment in favor of the suppliers on the employees' claims for defective design, strict liability for failure to warn, and negligence, because there was no evidence that the suppliers knew about the dangers of diacetyl and failed to provide adequate warnings and/or concealed the true nature of the hazards of diacetyl exposure.

The trial court did not err in granting summary judgment in favor of the suppliers on the employees' claim for fraudulent concealment because there was no evidence that the suppliers knew about and concealed the fact that diacetyl exposure could cause bronchiolitis obliterans.

The trial court did not err in granting summary judgment in favor of the suppliers on the employees civil conspiracy claim, because there was no evidence of an underlying tortious act and because there was no evidence that either supplier conspired with any other entity to harm the employees.

COUNSEL: Robert E. Sweeney Co., L.P.A., Mark Wintering, and Sean S. Kelly; Humphrey, Farrington & McClain, P.C., Kenneth B. McClain, Steven E. Crick, and Andrew K. Smith; and Gregory Leyh, P.C., for Plaintiffs-Appellants.

Brian D. Goldwasser, Vincent P. Antaki, Rick L. Weil, and Danny M. Newman, for Defendant-Appellee Citrus and Allied Essences, Ltd.

Ulmer & Berne, LLP, Jeffrey F. Peck, and Christopher J. Mulvaney; and Hinshaw & Culbertson, LLP, Daniel W. McGrath, and Joshua G. Vincent, for Defendant-Appellee Polarome International, Inc.

JUDGES: RALPH WINKLER, Judge. CUNNINGHAM, P.J., and DINKELACKER, J., concur.

OPINION BY: RALPH WINKLER

OPINION

[***292] [*29] *DECISION.*

RALPH WINKLER, Judge.

184 Ohio App. 3d 26, *; 2009 Ohio 4989, **;
919 N.E.2d 290, ***; 2009 Ohio App. LEXIS 4268

[**P1] On January 17, 2007, plaintiffs-appellants Robin Doane and Joey Wallace filed this lawsuit against their former employer, Givaudan Flavors Corporation [1] [*30] ("Givaudan"), three Givaudan employees, and defendants-appellees Citrus and Allied Essences, Ltd., ("Citrus") and Polarome International, Inc., ("Polarome") alleging that exposure at work to diacetyl, a butter-flavoring chemical, had caused them to develop the lung disease bronchiolitis obliterans. Citrus and Polarome supplied diacetyl to Givaudan.

1 In 1990, Givaudan was known as Fries & Fries, Inc. Between 1992 and 1997, Fries & Fries was a partner in Tastemaker, which operated the flavoring plant. In 1997, Givaudan purchased Tastemaker, and its name was changed to Givaudan-Roure Flavors Corporation. In 2000, the company became Givaudan Flavors Corporation.

[**P2] Robin Doane worked for Givaudan in various positions from June 7, 1993, to May 23, 1997. In 1994, she was promoted to "compounder." As a compounder, Doane was required to measure ingredients and mix them together according to Givaudan's flavor recipes. Doane received some safety training, and she was required to attend safety meetings. Doane identified diacetyl, acetaldehyde, and mustard-seed gas as chemicals requiring the use of a respirator. Doane stated in her deposition that she did not always wear a respirator, but that she would wear it when she encountered strong odors or when she was [***293] working with large quantities of certain chemicals. She sometimes did not use a respirator when working with small amounts of diacetyl because it "did not bother" her too much.

[**P3] On November 21, 1995, Doane was mixing a batch of flavor that included the chemical acetaldehyde. She removed her respirator before attempting to cover the tank with plastic. Escaping fumes caused Doane to lose her breath and experience tightness in her chest. She continued to experience tightness in her chest and difficulty breathing. A pulmonary-function test on December 14, 1995, showed a drop in Doane's breathing function. The examining doctor told Doane that she had bronchiolitis obliterans caused by exposure to acetaldehyde. In January 1996, a second doctor confirmed the diagnosis of bronchiolitis obliterans caused by exposure to workplace chemicals. Givaudan placed Doane in an administrative position in another building. Doane discovered that, in 1991, a woman working in Givaudan's "liquids department" had died from lung disease. The next woman who had taken that job had quit when she developed bronchiolitis obliterans. When Doane had taken the same job, Givaudan had not told her about the lung disease suffered by the two previous workers.

[**P4] Doane filed a workers' compensation claim for bronchiolitis obliterans caused by "work related exposure." Her claim was allowed on April 15, 1996. On October 21, 1997, Doane filed a claim for an additional award for violation of specific safety requirements. In that claim, Doane stated that her bronchiolitis obliterans was caused by exposure to chemicals at work including, but not limited to, acetaldehyde. On April 13, 1998, Doane settled her claim for an additional award and signed a release. On April 19, 2000, Doane also signed an agreed settlement of her workers' compensation claim that contained a release.

[*31] [**P5] Joey Wallace began working for Givaudan in June 1991. He received some safety training, attended safety meetings, and was provided a respirator. Wallace had access to the Material Safety Data Sheets ("MSDS") for diacetyl. As a lead operator, Wallace was responsible for the safety of other workers on his shift, including ensuring that the workers wore their respirators. Wallace testified that once he had mixed the various ingredients for a butter flavor containing diacetyl in a vessel, he did not wear a respirator. In June 1992, Wallace developed "cold-like symptoms" that caused shortness of breath when climbing stairs. Wallace consulted a doctor in July 1992 and went on short-term disability in August 1992. Wallace never returned to work. In December 1992, Givaudan suggested that Wallace see a pulmonary specialist. In January 1993, Wallace's primary-care physician suspected that his breathing problems were work-related and referred him to an occupational pulmonologist. In February 1993, Wallace began receiving social-security and long-term disability benefits. In August 1994, Wallace had a lung biopsy that confirmed a diagnosis of bronchiolitis obliterans as a result of workplace exposure. Wallace filed a workers' compensation claim on July 14, 1995, for bronchiolitis obliterans caused by workplace exposure to "powder, dust, fumes, liquids and some chemicals." Wallace stated that he had become aware of the work-related cause of his disability on May 18, 1995. At some point prior to 1997, Wallace had requested a copy of the MSDS for diacetyl from Givaudan. His workers' compensation claim was initially denied. Wallace appealed to the Hamilton County Court of Common Pleas, which ruled that he could participate in the workers' compensation fund. Wallace's [***294] further claims for permanent partial and permanent total disability were allowed in 1997 and 2000 respectively.

[**P6] In 1994, Givaudan had hired a doctor to investigate the lung disease occurring in its plant. There is some evidence that Givaudan may have wanted to

remain "officially ignorant" of the cause. Givaudan formed a task force to determine whether reported respiratory illness among its employees was worked-related and, if so, what particular ingredient had caused the illness. The investigators for the task force were not permitted to discuss bronchiolitis obliterans with the employees. Givaudan's employees were not told about the instances of lung disease.

[**P7] This case was consolidated with the case numbered A-0700446, a wrongful-death action involving another Givaudan employee. All defendants filed motions for summary judgment on statute-of-limitations grounds and various other grounds. The trial court granted the motions for summary judgment "as to the intentional tort claims." The court stated in its entry that it was granting summary judgment because Doane and Wallace "knew or should have known in the mid 1990's that they had been injured and that the workplace was dangerous." [*32] The court went on to specifically state that it was not deciding whether Doane's release in the workers' compensation case barred her present claims. The court also stated that it was not deciding whether Doane and Wallace had set forth a prima facie case of intentional tort against Givaudan. The court further stated that "Doane's and Wallace's claims under Counts 1, 2, 3, 4, and 5 fail for the reasons cited in the defendants' motions." Counts one through four all related to Citrus and Polarome, the suppliers of diacetyl to Givaudan. Count one alleged strict liability for defective design; count two alleged strict liability for failure to warn; count three alleged negligence; and count four alleged fraudulent concealment. Count five referred to all defendants and alleged civil conspiracy. The court's entry dismissed the complaint and stated that the judgment was a final determination on the merits in the case numbered A-0700452. The entry further stated that "this judgment entry does not affect Case No. A-0700446."

[**P8] Doane and Wallace have appealed. Wallace does not challenge the trial court's entry of summary judgment in favor of Polarome. Givaudan and its employees have since settled with Doane and Wallace.

[**P9] The first assignment of error alleges that the trial court erred in granting the motions for summary judgment on statute-of-limitations grounds.

[**P10] The trial court may grant a motion for summary judgment only when the evidence shows that no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears, with the evidence construed most strongly in favor of the nonmoving party, that reasonable minds can come to but one conclusion, and that conclusion is adverse to that party. [2]

2 See Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

[**P11] The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. [3] Once the moving party has satisfied its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. [4] Any [***295] doubt must be resolved in favor of the nonmoving party. [5]

3 See *Dresher v. Burt*, 75 Ohio St.3d 280, 1996 Ohio 107, 662 N.E.2d 264.
4 See id.
5 See *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992 Ohio 95, 604 N.E.2d 138.

[**P12] The applicable statute of limitations is set forth in R.C. 2305.10, which provides for a two-year period "after the cause of action accrues" in which to bring suit. R.C. 2305.10(B)(1) provides that a cause of action for bodily injury [*33] caused by "exposure to hazardous or toxic chemicals * * * accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever occurs first."

[**P13] Citrus and Polarome argue that the January 17, 2007, complaint was filed outside the limitations period because Doane and Wallace had been informed in the mid-1990s by competent medical authority that exposure to chemicals in the workplace had caused their bronchiolitis obliterans. Doane and Wallace counter that the discovery rule applied to toll the running of the limitations period because they could not have learned until 2006 that diacetyl was the specific chemical that had caused their injuries.

[**P14] Under the discovery rule, a cause of action does not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, that he or she was injured by the wrongful conduct of the defendant. [6] The discovery rule tolls the statute of limitations only until the plaintiff has an "indication" of the defendant's wrongful conduct. [7] The relevant standard for determining whether the discovery rule tolls the running of the statute of limitations is the plaintiff's knowledge of the legal injury or wrong committed by the defendant. [8] The discovery rule must be specifically tailored to the particular context to which it is applied. [9]

6 See *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002 Ohio 2007, 766 N.E.2d 977, citing *Collins v. Sotka*, 81 Ohio St.3d 506, 1998

Ohio 331, 692 N.E.2d 581, and *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 Ohio B. 335, 447 N.E.2d 727.

7 See id.

8 See *Meeker v. American Torque Rod of Ohio, Inc.* (1992), 79 Ohio App.3d 514, 607 N.E.2d 874.

9 See id. at P10, citing *Browning v. Burt*, 66 Ohio St.3d 544, 1993 Ohio 178, 613 N.E.2d 993.

[**P15] We hold that the running of the statute of limitations on Doane's and Wallace's causes of action was not tolled because, as set forth under the second assignment of error, there was no evidence of any wrongful conduct on the part of Citrus or Polarome that would have operated to toll the statute.

[**P16] We hold that the trial court did not err in granting summary judgment in favor of Citrus and Polarome on statute-of-limitations grounds. The first assignment of error is overruled.

[**P17] The second assignment of error alleges that the trial court erred in granting summary judgment in favor of Citrus and Polarome on the merits of counts one through five.

[*34] [**P18] Under R.C. 2307.78(A), a supplier is liable for compensatory damages based upon a products liability claim if the supplier was negligent and that negligence proximately caused an injury, or if the supplier's product did not conform to a representation made by the supplier and [***296] the failure to conform to that representation proximately caused an injury. [10]

10 R.C. 2307.78(A)(1) and (2).

[**P19] In addition, R.C. 2307.78(B)(7) provides that a supplier is subject to liability for compensatory damages based upon a products liability claim as if it were the manufacturer of a product, if the manufacturer would be subject to liability and the supplier marketed the product under its own label or trade name. Citrus and Polarome argue that as suppliers they cannot be held liable under R.C. 2307.78(B)(7). According to expert testimony, diacetyl is a naturally occurring chemical. Further, expert testimony established that diacetyl does not pose a threat below certain levels. The record shows that while Citrus and Polarome did not alter or adulterate the diacetyl in any way, they sometimes repackaged it into smaller containers and added their own warning labels and stickers. Construing the evidence most strongly in favor of Doane and Wallace, we hold that there are genuine issues of material fact as to whether Citrus and Polarome may be held liable as a manufacturer under R.C. 2307.78(B)(7).

[**P20] Counts one, two, and three allege strict liability for defective design, strict liability for failure to warn, and negligence. Counts four and five allege fraudulent concealment and civil conspiracy. The essence of all these claims is that Citrus and Polarome knew about the dangers of diacetyl and failed to provide adequate warnings and/or concealed the true nature of the hazards.

[**P21] Under R.C. 2307.76, a product is defective due to inadequate warning or instruction if the manufacturer knew or, in the exercise of reasonable care, should have known about a risk associated with the product that allegedly caused the harm for which the plaintiff seeks damages, and if the manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause the type of harm for which the plaintiff seeks compensation and in light of the likely seriousness of that harm. [11]

11 See *Sheets v. Karl W. Schmidt & Associates, Inc.*, 1st Dist. No. C-020726, 2003 Ohio 3198.

[**P22] The duty to warn and the standard for determining whether a warning is adequate are the same for both strict-liability and negligence claims. [12] [*35] To prove liability, it must be shown that, in the exercise of ordinary care, the manufacturer knew or should have known of the risk or hazard about which it failed to warn. [13] Further, it must be shown that the manufacturer failed to take the precautions that a reasonable person would have taken in presenting the product to the public. [14]

12 See *Lewis v. Clark Equipment Co.*, 1st Dist. No. C-020271, 2003 Ohio 1543; *Falkner v. Para-Chem*, 9th Dist. No. 21288, 2003 Ohio 3155.

13 See *Falkner v. Para-Chem*, supra, citing *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St.3d 251, 556 N.E.2d 1177.

14 See id.; *Lewis v. Clark Equipment Co.*, supra.

[**P23] In the MSDS provided by Citrus, diacetyl is described as "irritating to skin and eyes. Vapor is irritating to throat and lungs." Under "protection information," Citrus's MSDS provides, "Respiratory: Air purifying respirator; Ventilation: Mechanical; Eye: goggles; skin: rubber [***297] gloves." Polarome's MSDS for diacetyl states, "Liquid and vapor is irritating to the skin and eyes. Vapor is irritating to throat and lungs."

[**P24] The MSDS conveyed the general knowledge about the dangers of diacetyl at the time of Doane's and Wallace's exposure. It is undisputed that,

prior to 2001, there was no published scientific literature linking diacetyl to bronchiolitis obliterans. There is nothing in the record to indicate that either supplier knew or should have known that diacetyl caused bronchiolitis obliterans.

[**P25] Under the sophisticated-or-knowledgeable-purchaser doctrine, a manufacturer's duty to warn may be discharged by providing the information about the dangers of the product to a third person upon whom it can reasonably rely to communicate the warning to the ultimate users of the product. [15] The question is whether the manufacturer was reasonable in relying on an employer to convey the necessary information to its employees. [16] The reasonableness of the manufacturer's reliance on the employer to convey the warning involves a fact-specific evaluation. [17]

15 See *Adams v. Union Carbide Corp.* (C.A.6, 1984), 737 F.2d 1453; *Roberts v. George V. Hamilton, Inc.* (June 30, 2000), 7th Dist. No. 99 JE 26, 2000 Ohio App. LEXIS 2981; *Steinke v. Koch Fuels, Inc.* (1992), 78 Ohio App.3d 791, 605 N.E.2d 1341.

16 See *Roberts v. George V. Hamilton, Inc.*, supra; *Steinke v. Koch Fuels, Inc.*, supra.

17 See id.

[**P26] The record shows that Givaudan's knowledge about the dangers of diacetyl was equal to or greater than the knowledge of Citrus and Polarome. Givaudan created a task force to investigate the cause of respiratory disease among its employees. The task force's mission was to discover whether the respiratory disease among the employees was work-related, and if so, which [*36] particular chemical was causing the problem. There was some evidence that Givaudan wanted to remain "officially ignorant" of the cause of the disease and that the members of the task force were not permitted to mention bronchiolitis obliterans to the employees.

[**P27] Givaudan regulated the safety requirements of its employees. Givaudan also had exclusive control over the diacetyl after delivery, even putting its own labels on the drums. Givaudan managed its safety and health programs through a staff of professionals in those areas. Doane and Wallace testified that while working at Givaudan they received safety training that included instruction on the MSDS, attended safety meetings approximately once a month, had access to the MSDS, and were provided respirators along with other safety gear. Both Doane and Wallace identified diacetyl as a chemical that required the use of a respirator. Doane testified that she sometimes did not use a respirator when working with small amounts of diacetyl because it "did not bother" her too much. Wallace testified that once he had mixed the various ingredients for a butter flavor containing diacetyl in a vessel, he did not wear a respirator. Neither Doane nor Wallace had read or had attempted to read the MSDS for diacetyl while working at Givaudan.

[**P28] Construing the evidence most strongly in favor of Doane and Wallace, we hold that there are no genuine issues of material fact as to whether Citrus and Polarome, in the exercise of ordinary care, knew or should have known that diacetyl could cause bronchiolitis obliterans. The known dangers of diacetyl were communicated to Givaudan through the MSDS. Givaudan was a sophisticated purchaser [***298] that had knowledge equal to or greater than that of Citrus and Polarome about the dangers of diacetyl. The evidence, construed most strongly in favor of Doane and Wallace, showed that Citrus and Polarome were reasonable in relying on Givaudan to convey any necessary warnings to its employees. We hold that the trial court was correct in granting summary judgment in favor of Citrus and Polarome on counts one, two, and three.

[**P29] Doane and Wallace argue that the trial court erred in granting summary judgment on count four, which alleged fraudulent concealment. An action for fraudulent concealment requires proof of (1) a misrepresentation or concealment of a fact when there is a duty to disclose, (2) that is material to the transaction, (3) made falsely, or with knowledge of or reckless disregard as to its falsity, (4) with the intent of misleading another into relying on it, (5) justifiable reliance on the misrepresentation or concealment, and (6) resulting injury proximately caused by the reliance. [18]

18 See *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69, 23 Ohio B. 200, 491 N.E.2d 1101; *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009 Ohio 741, 908 N.E.2d 975.

[*37] [**P30] Doane and Wallace argue that Citrus and Polarome were in possession of "superior internal knowledge of diacetyl's hazards and affirmatively chose to withhold this information." The basis for this claim is that Citrus and Polarome belonged to a trade group and a flavoring industry "clearinghouse for scientific information" that stated in some literature that diacetyl was "harmful by inhalation" and "capable of systemic toxicity." Further, Doane and Wallace complain that Citrus and Polarome did not disclose early testing that indicated that diacetyl "caused toxicity" in certain animals.

[**P31] Doane and Wallace admit that they did not read the MSDS provided by Citrus and Polarome. In spite of that fact, Doane, Wallace, and Givaudan were clearly aware that diacetyl was harmful if inhaled and

that safety equipment including a respirator was required when working with diacetyl. The record shows that at the time Doane and Wallace were exposed to diacetyl, Citrus and Polarome did not know, and therefore did not conceal, that diacetyl exposure could cause bronchiolitis obliterans. We hold that the trial court was correct in granting summary judgment on the claims for fraudulent concealment.

[**P32] Finally, Doane and Wallace argue that the trial court erred in granting summary judgment on their claims for civil conspiracy as alleged in count five. Civil conspiracy is defined as "a malicious combination of two or more persons to injure another person in person or property, in a way not competent for one alone resulting in actual damage." [19] "A civil conspiracy claim requires an underlying tortious act that causes an injury. Thus, if there is no underlying tortious act, there is no actionable civil conspiracy claim." [20] We have held that the trial court correctly granted summary judgment in favor of Citrus and Polarome on counts one through four. Without an underlying tort, Doane and Wallace cannot establish a claim for civil conspiracy. In addition, there is no evidence in the record to support a claim that either Citrus or [***299] Polarome conspired with any other entity to harm Doane and Wallace. The trial court did not err in granting summary judgment in favor of Citrus and Polarome on count five. The second assignment of error is overruled.

19 See *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 1995 Ohio 61, 650 N.E.2d 863.

20 See *Gator Dev. Corp. v. VHH, Ltd.*, 1st Dist. No. C-080193, 2009 Ohio 1802, at P31, citing *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 1998 Ohio 294, 700 N.E.2d 859.

[**P33] The trial court's entry of summary judgment in favor of Citrus and Polarome is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and **DINKELACKER, J.**, concur.

[*38] RALPH WINKLER, retired, fof the First Appellate District, sitting by assignment.

LEXSEE

EBWS, LLC v. Britly Corporation

No. 05-449

SUPREME COURT OF VERMONT

2007 VT 37; 181 Vt. 513; 928 A.2d 497; 2007 Vt. LEXIS 69

May 25, 2007, Filed

SUBSEQUENT HISTORY: As Corrected August 6, 2007.

PRIOR HISTORY:
On Appeal from Orange Superior Court. Amy M. Davenport, J.

COUNSEL: William L. Durrell and David R. Bookchin of Benjamin, Bookchin, Colburn & Durrell, P.C., Montpelier, for Plaintiff-Appellee/Cross-Appellant.

Thomas M. Higgins and Robin Ober Cooley of Pierson Wadhams Quinn Yates & Coffin, Burlington, for Defendant-Appellant/Cross-Appellee.

JUDGES: PRESENT: Reiber, C.J., Dooley, Johnson and Skoglund, JJ., and Allen, C.J. (Ret.), Specially Assigned.

OPINION BY: REIBER

OPINION

[***501] [*P1] [**515] REIBER, C.J. This dispute arises from a construction contract in which defendant Britly Corporation agreed to build a creamery for plaintiff EBWS, LLC. After EBWS filed suit for alleged defects in construction, the superior court granted summary judgment for Britly on EBWS's claims of consumer fraud and negligence. Following a trial on the remaining claims, a jury awarded EBWS direct and consequential damages for breach of contract and breach of an express warranty. Both parties now appeal. Britly claims that the superior court erred in admitting evidence of consequential damages and by denying its motion for a new trial. In its cross-appeal, EBWS argues that the court erred in granting summary judgment on its consumer fraud and negligence claims, and by denying its request for attorney's fees, costs and prejudgment interest. We conclude that the court erred in allowing consequential damages in this case, and remand for further consideration of attorney's fees. In all other respects, we affirm.

[*P2] The Ransom family owns Rock Bottom Farm in Strafford, Vermont, where Earl Ransom owns a dairy herd and operates an organic dairy farm. In 2000, the Ransoms decided to build a creamery on-site to process their milk and formed EBWS to operate the dairy-processing plant and to market the plant's products. In July 2000, Earl Ransom, on behalf of EBWS, met with Britly's president, Larry Tassinari, to discuss building the creamery. Although Tassinari has no formal training in architecture or building design, he has been in the construction business for twenty-eight years and over the last ten years has constructed an average of five commercial buildings per year. After [**516] several months of negotiations, in January 2001, EBWS and Britly entered into a contract requiring Britly to construct a creamery building for EBWS in exchange for $ 160,318. EBWS contracted directly with other entities to perform the site work, electrical, heating and plumbing on the building. The creamery was substantially completed by April 15, 2001, and EBWS moved in soon afterward. On June 5, 2001, EBWS notified Britly of alleged defects in construction.

[*P3] On September 12, 2001, EBWS filed suit against Britly for damages resulting from defective design and construction. The complaint included several causes of action: (1) negligent design and execution, (2) negligent supervision, (3) consumer fraud, (4) breach of express warranties, (5) breach of contract, (6) breach of fiduciary duty, and (7) unjust enrichment. Britly claimed that the defects were minor and not attributable to its work. In addition, Britly counterclaimed for breach of contract and unjust enrichment.

[*P4] In response to opposing motions for summary judgment, the trial court dismissed EBWS's consumer fraud claim on January 5, 2004. The court also issued a show cause order for EBWS to demonstrate why its negligence claims should not be dismissed as a matter

of law pursuant to the economic-loss rule. Both parties submitted responses on the issue and, on the first day of trial, the court dismissed the negligence claims.

[*P5] The trial proceeded on EBWS's contract claims. EBWS and Britly both presented expert testimony regarding which construction defects were attributable to Britly and what the cost would be to repair the problems. EBWS's expert estimated the repairs would cost $ 38,020 and would require the creamery to cease operations for three weeks. Amy Huyffer, the CEO [***502] of EBWS, testified that during a three-week shut-down the creamery would suffer losses of $ 35,711. She explained that loss would come from two sources: milk the creamery would be required to purchase and dump, and employee wages it would be obligated to pay. Britly's principal, Tassinari, testified that Britly was not responsible for the plumbing, heating and site work of the building and that many of the drainage problems were attributable to work done by others. He further testified that EBWS owed $ 16,785 for work and materials in unpaid change orders. Britly's expert testified that to fix the ponding and mold problems the floor and walls could be cut and patched with concrete mortar. He estimated the repairs would take three to four days and cost between $ 7,000 and $ 8,500.

[*P6] Following a three-day trial, the jury found Britly had breached the contract and its express warranty, and awarded EBWS: (1) $ 38,020 [**517] in direct damages, and (2) $ 35,711 in consequential damages. The jury also awarded Britly $ 3,500 in damages on its counterclaim. Britly filed a motion for judgment as a matter of law or alternatively for a new trial. EBWS filed a motion for attorney's fees. The trial court denied the motions, and both parties appealed.

I.

A. Consequential Damages

[*P7] We begin by addressing Britly's claim that consequential damages are not available as a matter of law. "A motion for judgment as a matter of law is granted only where there is no legally sufficient basis for a reasonable jury to find for the nonmoving party." Perry v. Green Mountain Mall, 2004 VT 69, P7, 177 Vt. 109, 857 A.2d 793. The relevant facts pertaining to this issue are not in dispute, and thus, our review of the court's legal conclusion is nondeferential and plenary. N.A.S. Holdings, Inc. v. Pafundi, 169 Vt. 437, 438-39, 736 A.2d 780, 783 (1999).

[*P8] The jury's award to EBWS included compensation for both direct and consequential damages that EBWS claimed it would incur while the facility closed for repairs. Direct damages are for "losses that naturally and usually flow from the breach itself," and it is not necessary that the parties actually considered these damages. A. Brown, Inc. v. Vt. Justin Corp., 148 Vt. 192, 196, 531 A.2d 899, 901 (1987). In comparison, special or consequential damages "must pass the tests of causation, certainty and foreseeability, and, in addition, be reasonably supposed to have been in the contemplation of both parties at the time they made the contract." Id., at 192, 531 A.2d at 902.

[*P9] In this case, the trial court concluded that EBWS was not entitled to future lost profits, but did allow EBWS to present evidence of costs it would incur during a three-week closure-specifically, ongoing payments for milk and staff wages. On appeal, Britly contends that these damages are not available as a matter of law because the payments are prospective and voluntary and thus neither certain nor foreseeable. EBWS counters that Britly failed to properly preserve this argument below. We conclude that Britly properly preserved its objection and that the court erred in submitting these elements of damages to the jury.

[*P10] Although EBWS agrees that Britly generally objected to the inclusion of consequential damages, EBWS argues that Britly should have presented a clearer statement of its objection, specifically, that [**518] the damages for milk and wages were not recoverable because they were uncertain and voluntary. The stated objections [***503] were adequate to meet our standard. A motion for judgment as a matter of law may be made at any time prior to submission of the case to the jury and must specify the judgment sought and the law and facts upon which the moving party relies. V.R.C.P. 50(a)(2). The purposes of this requirement is to allow the trial court to determine if sufficient evidence exists to submit the issue to the jury, and to allow the nonmoving party an opportunity to cure any defects in proof, if possible. Cooper v. Cooper, 173 Vt. 1, 11, 783 A.2d 430, 438-39 (2001).

[*P11] It is evident from the transcript that the trial court understood Britly's objection and responded to it, and that EBWS had an opportunity to rectify any deficiencies in proof. On the second day of trial, at the close of EBWS's evidence, Britly objected to submitting evidence of consequential damages to the jury, based on its theory that lost profits for a new business are inherently speculative. The court deferred its ruling until the following morning. At the beginning of the second day of trial, the court ruled that EBWS could not recover for lost profits because it was not a going concern at the time the contract was entered into, and profits were too speculative. The court concluded, however, that EBWS could submit evidence of other business losses, including future payment for unused milk and staff wages. At the close of the evidence, defendant again moved for judgment as a matter of law on consequential damages.

See Maynard v. Travelers Ins. Co., 149 Vt. 158, 160, 540 A.2d 1032, 1033 (1987) (requiring moving party to renew objection at the close of the evidence where the trial court defers ruling at the close of opponent's case). The court reiterated its ruling that lost profits were not recoverable, but reasoned that it was up to the jury whether damages for milk and wages were certain and foreseeable. After the court read the jury instructions, Britly again restated its objection. See V.R.C.P. 51(b) (requiring objection to jury instructions to be made before jury retires to consider verdict).

[*P12] Although Britly's objections were not phrased with exactly the same terminology it uses on appeal, the objections were clear enough to allow both EBWS to cure defects in proof and the court to rule on the objection. See Cooper, 173 Vt. at 11, 783 A.2d at 438-39 (explaining that purpose of requiring an objection on sufficiency of the evidence at the close of the evidence is to allow the nonmoving party an opportunity to cure defects in proof). The trial court understood Britly's objection and responded to it by excluding lost profits, but allowing other expenses. Cf. Roberts v. Chimileski, 2003 VT 10, P14, [**519] 175 Vt. 480, 820 A.2d 995 (mem.) (limiting issues on appeal to those that trial court had an opportunity to evaluate). Under these circumstances, we conclude that Britly adequately preserved the issue for appeal.

[*P13] Having decided that the issue was properly preserved, we turn to the substance of the dispute. At trial, Huyffer, the CEO of EBWS, testified that during a repairs closure the creamery would be required to purchase milk from adjacent Rock Bottom Farm, even though it could not process this milk. She admitted that such a requirement was self-imposed as there was no written output contract between EBWS and the farm to buy milk. In addition, Huyffer testified that EBWS would pay its employees during the closure even though EBWS has no written contract to pay its employees when they are not working. The trial court allowed these elements of damages to be submitted to the jury, and the jury awarded EBWS [***504] consequential damages for unused milk and staff wages.

[*P14] On appeal, Britly contends that because there is no contractual or legal obligation for EBWS to purchase milk or pay its employees, these are not foreseeable damages. EBWS counters that it is common knowledge that cows continue to produce milk, even if the processing plant is not working, and thus it is foreseeable that this loss would occur. We conclude that these damages are not the foreseeable result of Britly's breach of the construction contract and reverse the award.

[*P15] In assessing EBWS's claim, we draw upon our past cases as a basis for comparison. Particularly instructive is Norton & Lamphere Constr. Co. v. Blow & Cote, Inc., 123 Vt. 130, 183 A.2d 230 (1962). In Norton, the plaintiff contracted to perform part of a highway construction project for the defendant. Id. at 131-32, 183 A.2d at 232. The defendant, however, never provided the plaintiff with an opportunity to complete the work, and the plaintiff sued for breach of contract. Following a trial, the jury awarded damages to the plaintiff for wages, costs to alter equipment, and financing costs for a loader and crusher. On appeal, the defendant argued that these elements of damages were not foreseeable and were therefore unavailable as a matter of law. We concluded that the first two items were recoverable as consequential damages, but the costs relating to the loader and crusher were not. In affirming the award for wages, we emphasized that the plaintiff had paid workmen in anticipation of the contract, and that the payments were made "solely for the purpose of performing the contract." Id. at 136, 183 A.2d at 235. Similarly, the equipment was altered specifically [**520] for performance of the contract and was "made with the full knowledge of the defendant." Id. at 137, 183 A.2d at 235.

[*P16] In contrast, we reversed the trial court's inclusion of damages relating to a loader and stone crusher. Although the plaintiff had purchased these items in connection with its work under the contract and had to pay to finance the purchase, "it was not a circumstance known to the defendant, nor one which could reasonably be supposed to have been in its contemplation at the time it contracted with the plaintiff." Id. at 138, 183 A.2d at 236. Consequently, costs relating to the crusher and loader were not recoverable.

[*P17] In comparison, we conclude that EBWS's claims for consequential damages are more like the finance charges, in that it is not reasonable to expect Britly to foresee that its failure to perform under the contract would result in this type of damages. While we are sympathetic to EBWS's contention that the cows continue to produce milk, even when the plant is closed down, this fact alone is not enough to demonstrate that buying and dumping milk is a foreseeable result of Britly's breach of the construction contract. Here, the milk was produced by a separate and distinct entity, Rock Bottom Farm, which sold the milk to EBWS. There was no output contract between EBWS and Rock Bottom Farm at the time the parties entered their construction contract, and a contractor could not have reasonably anticipated this expense. See Berlin Dev. Corp. v. Vt. Structural Steel Corp., 127 Vt. 367, 372, 250 A.2d 189, 192 (1968) (explaining that where premises were leased several months after building contract was entered into,

contractor could not have foreseen that faulty construction would result in damage to tenant's interest).

[*P18] Similarly, EBWS maintained no employment agreements with its employees obligating it to pay wages during periods of closure for repairs, dips in market demand, or for any other reason. Any [***505] losses EBWS might suffer in the future because it chooses to pay its employees during a plant closure for repairs would be a voluntary expense and not in Britly's contemplation at the time it entered the construction contract. It is not reasonable to expect Britly to foresee losses incurred as a result of agreements that are informal in nature and carry no legal obligation on EBWS to perform. "[P]arties are not presumed to know the condition of each other's affairs nor to take into account contracts with a third party that is not communicated." Id. at 371, 250 A.2d at 192. While it is true that EBWS may have business reasons to pay its employees even without a contractual obligation, for example to ensure employee loyalty, no evidence was introduced at trial by EBWS to [**521] support a sound rationale for such considerations. Under these circumstances, this business decision is beyond the scope of what Britly could have reasonably foreseen as damages for its breach of contract. See Wyatt v. Palmer, 165 Vt. 600, 602-03, 683 A.2d 1353, 1357 (1996) (mem.) (reversing trial court's award of damages for lost opportunity to refinance a mortgage in breach of a construction contract); Albright v. Fish, 138 Vt. 585, 590, 422 A.2d 250, 254 (1980) (rejecting claim for interest on loans and future property taxes on land purchased resulting from breach of a restrictive land covenant).

[*P19] In addition, the actual costs of the wages and milk are uncertain. Unlike the wages in Norton that were paid in anticipation of the contract, the milk and wages here are future expenses, for which no legal obligation was assumed by EBWS, and which are separate from the terms of the parties' contract. We note that at the time of the construction contract EBWS had not yet begun to operate as a creamery and had no history of buying milk or paying employees. See Berlin Dev. Corp., 127 Vt. at 372, 250 A.2d at 193 (explaining that profits for a new business are uncertain and speculative and not recoverable). Thus, both the cost of the milk and the number and amount of wages of future employees that EBWS might pay in the event of a plant closure for repairs are uncertain. Cf. Norton, 123 Vt. at 136, 183 A.2d at 235 (allowing consequential damages for wages already paid in anticipation of contract).

B. Motion for a New Trial

[*P20] Britly also contends that the trial court erred in denying its motion for a new trial because the jury's verdict was against the substantial weight of the evidence. Britly argues that there was evidence that the defective construction was attributable to work performed by contractors employed directly by EBWS and not within Britly's control. Specifically, Britly points to testimony that defects in the work performed by the site worker and the plumber, who were outside of Britly's control, contributed to the drainage problems with the floor. Because the jury awarded the full amount of the repair costs to EBWS, Britly concludes that the jury's verdict was against the substantial weight of the evidence. We affirm.

[*P21] On a motion for a new trial, the trial court must view the evidence in the light most favorable to the jury verdict. V.R.C.P. 59; Pirdair v. Med. Ctr. Hosp. of Vt., 173 Vt. 411, 416, 800 A.2d 438, 442-43 (2002). On appeal, from denial of a motion for a new trial, we will reverse only if the court has abused its discretion. Hardy v. Berisha, [**522] 144 Vt. 130, 134, 474 A.2d 93, 95 (1984). Viewing the evidence in the light most favorable to EBWS, we conclude that there was sufficient evidence to support the jury's verdict in its favor and find no abuse of discretion.

[***506] [*P22] At trial, EBWS's expert testified that the construction defects in the creamery, specifically the drainage problems, were a result of Britly's work. The expert averred that the floor of the creamery failed to conform to the specifications in the contract and fell below the industry standard because it did not properly slope to the drains. This caused ponding in several areas on the floor and mold to develop on the walls. In the expert's opinion, the floor's drainage and ponding problems were caused by drains set too high and an improperly installed concrete slab. The expert explained that it is industry practice to insure that drains are set at the correct height before pouring concrete.

[*P23] In response, Tassinari, Britly's principal, testified that the plumber, who was working directly for EBWS and outside of Britly's control, set the drains too high and caused the drainage problems. Tassinari further opined that "it is not an industry standard for the concrete guy to check the elevation of floor drains."

[*P24] Viewing this evidence in the light most favorable to EBWS, we conclude that there was enough evidence to support the jury's verdict that Britly was responsible for the construction defects. Although Britly presented evidence that the plumber failed to properly install the drains, there was additional evidence on the issue of whether Britly was responsible for the resulting defects in the floor. EBWS's expert testified that Britly had a responsibility to check the plumber's work and insure the floor sloped properly to the drains before pouring the concrete. See Lapoint v. Dumont Constr.

Co., 128 Vt. 8, 10-11, 258 A.2d 570, 571 (1969) (explaining that even where contractor did not personally make faulty connection, he was ultimately responsible and thus liable). The jury was free to credit the testimony of EBWS's expert over Britly's.

II.

A. Consumer Fraud

[*P25] We turn to EBWS's claims in its cross-appeal. EBWS first argues that the trial court erred in dismissing its consumer fraud and negligence claims on summary judgment. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); [**523] O'Donnell v. Bank of Vt., 166 Vt. 221, 224, 692 A.2d 1212, 1214 (1997). On appeal, we apply the same standard as the trial court. Id. In addressing these claims, we assume as true all allegations presented by EBWS. Hodgdon v. Mt. Mansfield Co., 160 Vt. 150, 158-59, 624 A.2d 1122, 1127 (1992).

[*P26] EBWS's claim arises under § 2453(a) of Vermont's Consumer Fraud Act. See generally Consumer Fraud Act, 9 V.S.A. § 2451. To survive summary judgment, EBWS must demonstrate: (1) that Britly made a representation or omission that was likely to mislead; (2) that EBWS interpreted the message reasonably under the circumstances; and (3) that the misleading effects were material. See Jordan v. Nissan N. Am., Inc., 2004 VT 27, P5, 176 Vt. 465, 853 A.2d 40 (listing elements of a consumer fraud claim).

[*P27] EBWS argues that at their first meeting Britly's president, Tassinari, made five statements that constituted negligent misrepresentation and consumer fraud. When EBWS first inquired as to whether Britly could build the creamery, Tassinari responded, "No problem, I can do that." He claimed that he had built buildings "substantially more complex" and that "this is an easy building." Finally, he remarked that the creamery would take "two months start to finish" and that [***507] he could have EBWS "in the building by the end of January."

[*P28] We agree with the trial court that "there is no evidence that the [Tassinari] statements were false or misleading in any material way." The court reasoned that none of the allegations regarding poor construction, including failure to properly slope the concrete floor, revealed an inability to design and build a creamery. Thus, the first three statements were not inaccurate or likely to mislead because there was no evidence that Britly was incapable of building a creamery or that building a creamery was uniquely demanding. Moreover, Britly's statements regarding the length of time it would take to complete the creamery did not amount to fraud because the statements were not likely to mislead. By the time that EBWS entered into its contract with Britly, it was already January and more than two months had elapsed since the parties' first meeting. Therefore, when it entered the construction contract, EBWS knew that the building would not be completed in two months and that it would not be in the building by the end of January.

[**524] B. Negligence Claims

[*P29] EBWS appeals the trial court's dismissal of its claims for negligent design and execution. The trial court issued a show cause order for EBWS to explain why its negligence claims should not be dismissed pursuant to the economic-loss rule because EBWS alleged solely economic damages. EBWS responded that Britly's work was an exception to the economic-loss rule because it was a professional service. In an oral ruling on the first day of trial, the court concluded that the professional-services exception to the economic-loss rule required some kind of special relationship between the parties, which was absent in this case. Consequently, the court dismissed EBWS's negligence claims because any alleged negligence caused purely economic damages. On appeal, EBWS claims that designing and building the creamery was a professional service akin to architecture that should fall within a professional-services exception to the economic-loss rule. Britly counters that because it was not a licensed architect it was not providing professional services within the meaning of the exception. We affirm the court's decision that Britly's work did not fall within an exception to the economic-loss rule.

[*P30] The economic-loss rule prohibits recovery in tort for purely economic losses. Springfield Hydroelec. Co. v. Copp, 172 Vt. 311, 314, 779 A.2d 67, 70 (2001). The rule strives to maintain a separation between contract and tort law. In tort law, duties are imposed by law to protect the public from harm, whereas in contract the parties self-impose duties and protect themselves through bargaining. See id. Thus, negligence actions are limited to those involving unanticipated physical injury, and "claimants cannot seek, through tort law, to alleviate losses incurred pursuant to a contract." Id. In Springfield, we recognized that there might be recovery for purely economic losses in a limited class of cases involving violation of a professional duty. Id. at 316, 779 A.2d at 71-72. We did not specify which services would fall into such an exception, but explained that although the appellees in that case "maintained complex and highly specialized responsibilities," they "did not hold themselves out as providers of any licensed professional service." Id. at 316-17, 779 A.2d at 72.

[*P31] Purely economic losses may be recoverable in professional services cases because the parties have a special relationship, which creates a duty of care independent of contract obligations. [***508] Id. at 316, 779 A.2d at 71-72. Thus, the key is not whether one is licensed in a particular field, as the parties have focused upon; rather, the determining [**525] factor is the type of relationship created between the parties. See Business Men's Assurance Co. v. Graham, 891 S.W.2d 438, 453 (Mo. Ct. App. 1994) (allowing party to sue for purely economic damages in tort "if the party sues for breach of a duty recognized by the law as arising from the relationship or status the parties have created by their agreement"). Although a license may be indicative of this relationship, it is not determinative.

[*P32] No such relationship existed in this case. Britly presented itself as a construction contractor and not as a provider of a specialized professional service. EBWS did not rely on Britly to provide it with a professional service, and, consequently, it paid for the services of a contractor not a professional architect. See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 881 P.2d 986, 992 (Wash. 1994) (noting that fees "charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract"); see also Moransais v. Heathman, 744 So. 2d 973, 976 (Fla. 1999) (explaining the difference between a general contractual duty to deliver services in a workmanlike manner and the professional duty to use standard of care used by similar professionals). Thus, we conclude there was no special duty of care created beyond the terms of the construction contract and no exception to the economic-loss rule applies.

C. Attorney's Fees & Prejudgment Interest

[*P33] Finally, we address EBWS's request for attorney's fees, expenses and prejudgment interest. Following the verdict, EBWS filed a motion requesting attorney's fees both as due under the contract and pursuant to statute. The construction contract states that in a suit to recover damages for breach of contract, "the prevailing party shall be entitled to recover reasonable attorneys' fees, costs, charges, and expenses expended or incurred therein." In addition, Vermont's construction contracts statute requires an award of reasonable attorney's fees to "the substantially prevailing party." 9 V.S.A. § 4007(c). The trial court denied EBWS's request in a motion response form, without any explanation. We conclude that EBWS properly requested attorney's fees and that the court erred in summarily denying the request.

[*P34] A request for attorney's fees and related expenses must be made by motion no later than fourteen days after entry of judgment. V.R.C.P. 54(d)(2)(B). Under the rule, once a party requests fees, the court "shall find the facts and state its conclusions of law." V.R.C.P. 54(d)(2)(C). [**526] The trial court has discretion in crafting the amount of an award, but where fees are due by law, it is an abuse of discretion to deny all fees. See Perez v. Travelers Ins., 2006 VT 123, P8-9, 181 Vt. 45, 915 A.2d 750 (explaining that an award is mandatory when fees are due pursuant to a statutory fee-shifting provision). But see Fletcher Hill, Inc. v. Crosbie, 2005 VT 1, P12, 178 Vt. 77, 872 A.2d 292 (holding that the question of whether a party substantially prevailed within the meaning of 9 V.S.A. § 4007(c) is a matter for the trial court's discretion).

[*P35] Here, EBWS complied with Rule 54(d)(2) and submitted a motion for attorney's fees to the court following the jury's verdict. Following this request, the court made no findings concerning whether EBWS was entitled to fees under the contract [***509] as the "prevailing party," or whether it was entitled to fees pursuant to statute as the "substantially prevailing party." Thus, without any findings or conclusions to support its decision, we conclude the court erred in denying fees. See Murphy v. Stowe Club Highlands, 171 Vt. 144, 163-64, 761 A.2d 688, 702 (2000) (explaining that generally the jury must determine whether attorney's fees are due pursuant to a contract, but fees may be awarded without a jury finding if due by law); Bonanno v. Bonanno, 148 Vt. 248, 251, 531 A.2d 602, 604 (1987) ("On review, the trial court's findings will be deemed insufficient when we are left to speculate as to the basis of the trial court's decision."). We remand for the court to make findings and conclusions pertaining to attorney's fees.

[*P36] EBWS also requests prejudgment interest as a mandatory award because it contends that the direct damages were reasonably ascertainable. As with the attorney's fees, the court denied prejudgment interest without explanation. Prejudgment interest is awarded as of right when damages are liquidated or reasonably certain. Agency of Natural Res. v. Glens Falls Ins. Co., 169 Vt. 426, 435, 736 A.2d 768, 774 (1999). The rationale is that "'the defendant can avoid the accrual of interest by simply tendering to the plaintiff a sum equal to the amount of damages.'" Id. (quoting Johnson v. Pearson Agri Sys., Inc., 119 Wis. 2d 766, 350 N.W.2d 127, 130 (Wis. 1984)). In those cases where the amount of damages is uncertain or disputed, the trial court may award prejudgment interest in a discretionary capacity. Estate of Fleming v. Nicholson, 168 Vt. 495, 501, 724 A.2d 1026, 1029 (1998).

[*P37] We conclude that prejudgment interest was not mandatory in this case. Although EBWS claims that

the amount of direct damages is certain, there was much controversy at trial as to what [**527] repairs were necessary and how much it would cost to complete repairs. EBWS and Britly presented conflicting expert testimony about how to correct the drainage problems. EBWS's expert recommended removing and replacing the floor and interior walls of the creamery, explaining that this was the only solution that would work in the long-term. The expert testified the repairs would take three weeks and cost $ 38,020. In contrast, Britly's expert testified that to fix the ponding and mold problems, the floor and walls could be cut and patched with concrete mortar. He estimated the repairs would take three to four days and cost between $ 7,000 and $ 8,500. Thus, the amount of damages was not reasonably certain, Winey v. William E. Dailey, Inc., 161 Vt. 129, 141, 636 A.2d 744, 752 (1993) (noting that where there is conflicting expert testimony, the amount is not reasonably certain), and it was within the court's discretion to deny prejudgment interest in this case. Estate of Fleming, 168 Vt. at 501, 724 A.2d at 1030 (deferring to trial court's determination of whether prejudgment interest is available in cases where the amount of damages is not reasonably ascertainable). Award for consequential damages is reversed, and the case is remanded for consideration of attorney's fees; otherwise, affirmed.

LEXSEE

Enterprise Roofing & Sheet Metal Co., Inc., Appellant v. Charles Svec, Inc., Appellee

Court of Appeals No. OT-94-052

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, OTTAWA COUNTY

1995 Ohio App. LEXIS 2269

June 2, 1995, Decided

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: Trial Court No. 94-CVH-058.

DISPOSITION: JUDGMENT AFFIRMED.

COUNSEL: Stephen T. Pennington, for appellant.

Erin B. Parr, for appellee.

JUDGES: Peter M. Handwork, J., George M. Glasser, J., Charles D. Abood, P.J., CONCUR.

OPINION BY: CHARLES D. ABOOD

OPINION

OPINION AND JUDGMENT ENTRY

ABOOD, P.J. This is an accelerated appeal from a judgment of the Ottawa County Court of Common Pleas [1] in which summary judgment was granted in favor of appellee, Charles Svec, Inc. ("Svec"), and appellant, Enterprise Roofing & Sheet Metal Co., Inc.'s ("Enterprise"), complaint for damages arising from an alleged breach of warranty which was dismissed, based on the four-year statute of limitations provided for by R.C. 1302.98.

1 This lawsuit was originally filed in the Lucas County Court of Common Pleas however, on April 5, 1994, appellee filed a motion for change of venue and on April 6, 1994, the case was transferred to the Ottawa County Court of Common Pleas.

[*2] Appellant sets forth the following two assignments of error on appeal:

> ***"Assignment of Error No. 1:***
>
> "The trial court erred in granting summary judgment for Defendant based on the statute of limitations, where there was a genuine issue of material fact which would affect the application of the statute of limitations.
>
> "***Assignment of Error No. 2:***
>
> "The trial court erred in granting summary judgment for Defendant based on the statute of limitations, where Plaintiff's claim is in
>
> reality one for indemnity, for which the limitations period does not begin to run until Plaintiff suffers a loss."

The facts which are relevant to the issues raised on appeal are as follows. On October 21, 1987, Enterprise contracted to purchase 36,500 units of Roofblok roofing material from Svec. The materials were delivered in November 1987, and shortly thereafter were installed by Enterprise in an administration building at the Davis Besse Nuclear Power Station in Oak Harbor, Ohio. On June 2, 1992, after having been informed that the Roofblok system was defective, Enterprise prepared a report as to the extent of the damage [*3] and sent the

original to the manufacturer, Roofblok Limited, and a copy to Svec. On or about July 28, 1992, Enterprise notified Svec directly that the Roofblok system had begun to deteriorate. When it received no response, Enterprise made several additional attempts to communicate with Svec and to involve it in solving the problem. In September 1993, Enterprise replaced the defective Roofblok system with another roofing system, at its own expense.

On January 14, 1994, Enterprise filed its complaint against Svec in which it alleged breach of contract and breach of warranty due to the defective roofing materials and sought damages in the amount of $ 41,022.

Svec answered and on August 5, 1994, filed a motion for summary judgment and memorandum in support, in which it argued that the sale of the Roofblok system was a sale of "goods" as defined in R.C. 1302.01(A)(8) and therefore Enterprise's claims were barred by R.C. 1302.98, which establishes a four-year statute of limitation for claims of breach of contract and breach of warranty arising from such sales. On September 2, 1994, Enterprise filed its memorandum in opposition in which it argued that the claim should not be time-barred [*4] because Svec had supplied, as part of its "sales materials and specification documentation," a "ten-year limited material warranty for the Roofblok ballast blocks"; the defect in the roof was not discovered until April 15, 1991; and, therefore, a genuine issue of material fact exists as to whether there was an effective "warranty" which extended the statutory limitation period. In support of its arguments, Enterprise attached to its memorandum: 1) the affidavit of Donald F. Entenman, an "employee," which set forth the circumstances surrounding the purchase of the Roofblok system, the discovery of the defect and the repeated efforts by Enterprise to report the defect to Svec; 2) a copy of a letter from Entenman to the sales manager of Roofblok Limited which detailed the problems with the system and stated that Enterprise expected financial assistance in correcting the problem on behalf of its customer; and 3) a copy of a document titled "Ten Year Limited Material Warranty for ROOFBLOK Ballast Blocks" across which was printed the word "SAMPLE."

On September 13, 1994, Svec filed its reply in which it asserted that since: 1) the alleged "warranty" was both unexecuted and clearly marked [*5] "SAMPLE"; 2) the "repair or replace" language in that document was ineffective to extend the term of its liability pursuant to R.C. 1302.98(B); and 3) Entenman's letter was addressed to Roofblok Limited, its parent company, rather than directly to Svec, Enterprise had not submitted evidence that raised a genuine issue of material fact and it was therefore entitled to summary judgment.

On September 28, 1994, the trial court filed its judgment entry in which it found that the Roofblok system constituted "goods" pursuant to R.C. 1302.01(A)(8); that delivery was "tendered" on November 10, 1987; and that Enterprise's claims, which were not brought until January 14, 1994, were time-barred pursuant to R.C. 1302.98. As to Enterprise's claim that the "warranty" was sufficient to extend the statutory period of limitation, the trial court found that there was insufficient evidence presented by Enterprise to establish the existence of a warranty. Accordingly, the trial court granted summary judgment in favor of Svec and dismissed Enterprise's complaint.

In its first assignment of error, appellant argues that the trial court erred because the issue of "whether this document or other written materials [*6] created an express warranty sufficient to affect the application of the statute of limitations is for the jury to decide."

Appellee responds that: 1) the alleged warranty is actually a "disclaimer of warranties and a limitation of remedies" which does not operate to extend the statutory limitation period, " *** but rather applies only to the manufacturing process"; and 2) the document was a "sample" which, pursuant to its own terms, did not become effective until completed and returned to appellee.

In reviewing a summary judgment, this court must apply the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129, 572 N.E.2d 198. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Initially, the party seeking summary judgment bears the burden of delineating which areas of the opponent's claim raise no genuine issues of material fact. The moving party may support its assertions "by affidavits or otherwise [*7] as allowed by Civ.R. 56(C)" *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Once the moving party meets its burden, the non-moving party must produce evidence on the issue or issues identified by the movant for which it bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus.

In this case, it is undisputed that the sale of the Roofblok system was a sale of "goods" pursuant to R.C. 1302.01(A)(8) and, as such, it is governed by the provisions of R.C. 1302.01 to 1302.98, which is Ohio's version of Section 2 of the Uniform Commercial Code.

As to the applicable statute of limitations, we note at the outset that R.C. 1302.98 states, in pertinent part, that:

> "(A) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. ***
>
> "(B) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the [*8] goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered."

Without a warranty which "explicitly extends to future performance of the goods," the discovery rule found in R.C. 1302.98(B) does not apply. *Allis-Chalmers Credit Corp. v. Herbolt* (1984), 17 Ohio App.3d 230, 237, 479 N.E.2d 293. The creation of an express warranty, as with any other contract, is determined by examining the intent of the parties to a particular sale and need not be expressed in written form in order to be valid since, pursuant to R.C. 1302.26:

> "(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods *and becomes part of the basis of the bargain* creates an express warranty that the goods shall conform to the affirmation or promise.
>
> "(2) Any description of the goods *which is made part of the basis of the bargain* creates an express warranty that the goods shall conform to the description." (Emphasis added.)

Upon consideration of the all of the evidence that was before the trial court and the law, this court finds that: 1) appellant [*9] did not present evidence that was sufficient to raise a genuine issue of material fact as to whether the parties intended to have a ten-year warranty be part of the basis of their bargain; when construing the evidence most strongly in appellant's favor, reasonable minds can only conclude that appellant's claim is barred by the four-year statute of limitations in R.C. 1302.98; and 3) appellant's first assignment of error is not well-taken.

In appellant's second assignment of error, it asserts that its claim is not time-barred because it "is in fact one for indemnity" and that such a cause of action " *** does not accrue until the party seeking indemnity has suffered a loss," therefore, the four-year limitation period began to run on October 10, 1993, the date replacement of the roof was completed.

Appellee responds that the issue of indemnity is not properly raised for the first time on appeal and that appellant is estopped from raising this argument because it acknowledged to the trial court " *** that the Ohio UCC and its limitation provision found in R.C. § 1302.98 applies to this matter."

Upon consideration of the entire record of proceedings before the trial court, this court [*10] finds that, since appellant argued that the statute of limitations set forth in R.C. 1302.98 governed the outcome of this case at all previous stages of this litigation, it is now estopped from asserting another theory of recovery for the first time on appeal. *Allis-Chalmers, supra*, at 232. See, also, *First Federal Savings and Loan Assn. of Akron v. Cheton & Rabe* (1989), 57 Ohio App.3d 137, 567 N.E.2d 298 ("An appellate court will not consider any error which counsel for the party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention *** ." *Id.* at 144.). Appellant's second assignment of error is therefore not well-taken.

Upon consideration whereof, this court finds that substantial justice has been done the party complaining, and the judgment of the Ottawa County Court of Common Pleas is hereby affirmed. Court costs are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist. [*11] Loc.App.R. 4, amended 7/1/92.

Peter M. Handwork, J.

George M. Glasser, J.

Charles D. Abood, P.J.

CONCUR.

LEXSEE

SCOTT M. EPSTEIN v. C.R. BARD, INC.

CIVIL ACTION NO. 03-12297-RWZ

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2005 U.S. Dist. LEXIS 26993; 60 U.C.C. Rep. Serv. 2d (Callaghan) 235

November 8, 2005, Decided

SUBSEQUENT HISTORY: Affirmed by Epstein v. C.R. Bard, Inc., 2006 U.S. App. LEXIS 21697 (1st Cir. Mass., Aug. 25, 2006)

PRIOR HISTORY: Epstein v. C.R. Bard, Inc., 2004 U.S. Dist. LEXIS 13384 (D. Mass., July 19, 2004)

COUNSEL: [*1] For Scott M. Epstein, Plaintiff: Gary E. Lambert, Patrick D. Archibald, Lambert & Associates, Boston, MA.

For C.R.Bard, Inc., Defendant: Andrew Good, Good & Cormier, Boston, MA; Matthew P. Zisow, Good & Cormier, Boston, MA.

For Futuremed Interventional, Inc., Defendant: Michael A. Albert, Wolf, Greenfield & Sacks, PC, Boston, MA; Michael N. Rader, Wolf, Greenfield & Sacks, PC, Boston, MA.

For Crossbow Ventures, Inc., Defendant: Michael A. Albert, Wolf, Greenfield & Sacks, PC, Boston, MA; Michael N. Rader, Wolf, Greenfield & Sacks, PC, Boston, MA; Samuel D. Levy, Wuersch & Gering LLP, New York, NY.

JUDGES: RYA W. ZOBEL, UNITED STATES DISTRICT JUDGE.

OPINION BY: RYA W. ZOBEL

OPINION

MEMORANDUM OF DECISION

Plaintiff Scott Epstein designed innovative catheters and negotiated the sale of 50,000 of them to defendant C.R. Bard, Inc., over 18 months at the price of $ 3.50 per catheter. (*See* Compl. P 25). Subsequently, defendant allegedly disclosed plaintiff's design to an outside vendor and canceled its order from plaintiff. Plaintiff sued on a variety of claims, and defendant successfully moved to dismiss eight of the ten counts in the complaint. (*See* Compl. PP 37-38). The remaining [*2] Counts 1 and 9 assert breach of contract and the implied covenant of good faith and fair dealing. Defendant now moves for judgment on the pleadings with respect to these two counts on statute of limitations grounds, as well as failure to allege all necessary elements of the claims. Plaintiff opposes.

The parties agree that whether the statute of limitations has run on plaintiff's claims depends on whether the contractual relationship is governed by the Uniform Commercial Code (the "UCC"), as urged by defendant, or by state statute governing contract actions, as recommended by plaintiff. *See* Mass. Gen. Laws ch. 106 § 2-725; *id.* at ch. 260 § 2. The UCC requires that "an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued," whereas the contract statute would provide a six-year limitation period. *Id.*

"Article 2 of the UCC applies to all 'transactions in goods.'" *Neuhoff v. Marvin Lumber and Cedar Co.*, 370 F.3d 197, 205 (1st Cir. 2004). The term "goods" refers to "all things . . . which are movable at the time of identification to the contract for sale. . . ." Mass. Gen. Laws ch. 106 §§ 2-102 [*3] . Defendant asserts that the sale of catheters constitutes a transaction in goods through a contract for sale. Plaintiff, on the other hand, argues that the sale involves future goods, meaning "goods which are not both existing and identified . . .," and thus does not amount to a transaction in goods. Mass. Gen. Laws ch. 106 §§ 2-102, 2-105. However, plaintiff fails to reconcile his position with the full statutory provision regarding future goods:

> Goods must be both existing and identified before any interest in them can

> pass. Goods which are not both existing and identified are "future" goods. *A purported present sale of future goods or of any interest therein operates as a contract to sell.*

Id. (emphasis added). Moreover, the UCC defines "contract for sale" to include "both a present sale of goods and a contract to sell goods at a future time." Mass. Gen. Laws ch. 106 § 2-106. In other words, the plain language of the UCC characterizes sales of future goods as contracts for sale and, thus, "transactions in goods" within the scope of UCC governance, and plaintiff offers no competing authority to this [*4] straightforward interpretation. As a result, the contract for plaintiff to sell future catheters constitutes a transaction in goods covered by the UCC and is subject to the four-year statute of limitations that applies to "breach of any contract for sale." Mass. Gen. Laws ch. 106 § 2-725. Plaintiffs claims in Counts 1 and 9 are, therefore, both time-barred.

Defendant's successful motion notwithstanding, the court reiterates its displeasure at defendant's filing of serial dispositive motions in contravention of the court's earlier instructions and emphasizes that it reviewed the instant motion only in the interest of efficiency for all parties.

Accordingly, defendant's motion for judgment on the pleadings (# 49 on the docket) is allowed, and judgment may be entered dismissing the Complaint.

DATE

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

LEXSEE

Sheila Farnham, Guardian of Gerald Farnham v. Bombardier, Inc.

SUPREME COURT DOCKET NO. 93-037

SUPREME COURT OF VERMONT

161 Vt. 619; 640 A.2d 47; 1994 Vt. LEXIS 14

February 1, 1994, FILED

PRIOR HISTORY: [***1] APPEALED FROM: Washington Superior Court. DOCKET NO. S650-89WnC.

DISPOSITION: Affirmed.

JUDGES: Frederic W. Allen, Chief Justice, Ernest W. Gibson III, Associate Justice, John A. Dooley, Associate Justice, James L. Morse, Associate Justice, Denise R. Johnson, Associate Justice

OPINION BY: BY THE COURT

OPINION

[**48] [*619] *ENTRY ORDER*

Plaintiff Sheila Farnham appeals from the grant of summary judgment in favor of defendant Bombardier, Inc., in her products liability action. We affirm.

Plaintiff is the guardian of Gerald Farnham, who was injured in an accident that occurred during a snowmobile race between five snowmobilers on a runway about thirty feet wide at a private airstrip in Washington, Vermont. Defendant is the manufacturer of a Ski-doo Formula MX snowmobile ridden by another racer, John Kinnarney. The snowmobiles reached speeds in excess of 60 m.p.h. Plaintiff alleged that Kinnarney's snowmobile flipped over and struck Gerald Farnham when both racers' vehicles were caught in a whiteout and Kinnarney braked his snowmobile in an attempt to slow down. There were no witnesses to the actual [***2] moment of injury, but Gerald Farnham was found unconscious beside the track with a small wound in the back of his head. The helmet he had been wearing was on the ground some distance away. He remains comatose.

Plaintiff claimed strict liability, among other things, alleging that the snowmobile ridden by Kinnarney contained design defects that rendered it unstable when braking at high speeds within its designed speed range. The court granted defendant's motion for summary judgment because of a lack of evidence of a design defect, without reaching Bombardier's defenses of assumption of the risk and superseding cause.

[*620] Reviewing a grant of summary judgment, we apply the same standard as the trial court, namely, that the motion should be granted when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Garneau v. Curtis & Bedell, Inc.*, 158 Vt. 363, 366, 610 A.2d 132, 133 (1992). Summary judgment is appropriate if, after adequate time for discovery, a plaintiff is unable to make a sufficient showing to establish the existence [***3] of an element essential to her case, and on which she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254-55, 565 A.2d 1326, 1329 (1989).

To establish strict liability in a products liability action, a plaintiff must show that the defendant's product (1) is defective; (2) is unreasonably dangerous to the consumer in normal use; (3) reached the consumer without undergoing any substantial change in condition; and (4) caused injury to the consumer because of its defective design. Restatement (Second) of Torts § 402A (1965); see *Zaleskie v. Joyce*, 133 Vt. 150, 154-55, 333 A.2d 110, 113-14 (1975) (adopting § 402A "strict product liability" in this jurisdiction). It is plaintiff's burden to show a defective condition. Restatement, *supra*, § 402A comment g. A product is defective if it is not "safe for normal handling and consumption." *Id.* comment h. Further, "unreasonably dangerous" means the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as [***4] to its characteristics." *Id.* comment i.

Plaintiff contends that defendant did not raise the issue of product defect in its motion for summary judgment; therefore, plaintiff had no burden to present evidence on defect. Defendant's motion, however, plainly stated that the snowmobile was not [**49] defective, albeit without isolating that statement under a special heading: "Plaintiff alleges in her Complaint that the snowmobile manufactured by Bombardier is defective in that it becomes unstable and may go out of control at high speeds. . . . There was nothing wrong with Bombardier's product." Plaintiff cites *John Deere Co. v. American Nat'l Bank*, 809 F.2d 1190 (5th Cir. 1987), which held that "a district court may not grant summary judgment *sua sponte* on grounds not requested by the moving party." *Id.* at 1192. In this case, however, defendant responded to plaintiff's allegation that the snowmobile was defective, and thus there was no sua sponte action by the court. See Black's Law Dictionary 1277 (5th ed. 1979) (defining "sua sponte" as "voluntarily; without prompting or suggestion").

In ruling against plaintiff on [***5] the element of design defect, the trial court examined the deposition testimony of plaintiff's expert, engineer Stanley J. Klein. Klein testified both to the inherent instability of the machine at high speeds and to its inadequate braking system for safe stops at high speeds. The court concluded that speeds in excess of 60 m.p.h. were not normal use and held that the expert testimony was insufficient to establish a product defect because nowhere had Klein stated that the Ski-doo was unreasonably dangerous in normal use.

On appeal, plaintiff argues that although the expert may not have uttered the "magic words," "unreasonably dangerous in normal use," the substance of his testimony was more than sufficient to show product [*621] defect. Plaintiff also argues that "normal use" includes foreseeable misuse. See *Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 538 (5th Cir. 1987) (normal use of product includes all reasonably foreseeable uses, including foreseeable misuse). Plaintiff points to defendant's own testimony that the Ski-doo ridden by Kinnarney was capable of travelling over 60 m.p.h.

We do not address these arguments at length because we agree with [***6] the trial court's conclusion that the expert's assertions in this case, which are all plaintiff put forward during two years of discovery, are insufficient evidence of a product defect. Moreover, this case is different from *Vickers*. There, the manufacturer of a large air compressor built a stairway for access and egress from the top of the unit, but the stairway was not visible and plaintiff jumped off the top of the compressor, injuring himself. The court held that since the stairway was not visible, the manufacturer should have foreseen the misuse that occasioned plaintiff's injuries. *Id.* at 539.

The facts of this case are more like those in *Menard v. Newhall*, where a seven-year-old boy was blinded in a BB-gun fight. We held that the gun was not unreasonably dangerous because the fact "that a BB gun, if fired at a person, could injure an eye, is nothing that even a seven-year-old child does not already know." 135 Vt. 53, 56, 373 A.2d 505, 507 (1977). Here, as in *Menard*, the consequences were terrible. But the dangers of racing snowmobiles five abreast on a narrow strip of land at high speeds [***7] are manifestly within the common knowledge of the ordinary consumer. There is no evidence that the snowmobile was unreasonably dangerous under these circumstances even if it behaved as plaintiff alleges. See *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1507 (11th Cir. 1990) (where plaintiff injured when she jumped into water next to pleasure boat, boat's unguarded propeller not dangerous beyond expectation of ordinary consumer because "consumer clearly understands that a revolving propeller involves danger"); *Hylton v. John Deere Co.*, 802 F.2d 1011, 1015 (8th Cir. 1986) (where danger of climbing into bin of combine was open and obvious, design of combine not dangerous beyond contemplation of ordinary consumer).

Affirmed.

BY THE COURT: Frederic W. Allen, Chief Justice, Ernest W. Gibson III, Associate Justice, John A. Dooley, Associate Justice, James L. Morse, Associate Justice, Denise R. Johnson, Associate Justice